Supreme Court, U.S.
FILED

No.

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In The
Supreme Court of the United States

SAMUEL A. PERRONI,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI
WITH APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant in a criminal trial, *e.g.*, Petitioner, an attorney accused of criminal contempt, has a substantive or procedural due process right to a fair and impartial judge.

2. Whether, consistent with the Constitution's due process requirements, a judge may simultaneously act as an investigator, witness, prosecutor and judge in a criminal contempt trial.

LIST OF PARTIES

The parties to this proceeding are as follows:

The Petitioner is Samuel A. Perroni.

The Respondent is the State of Arkansas.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS DELIVERED BELOW 1

GROUNDS UPON WHICH JURISDICTION IS INVOKED 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATUTORY PROVISION INVOLVED 3

STATEMENT OF THE CASE 4

ARGUMENT 11

I. WHETHER A DEFENDANT IN A CRIMINAL TRIAL, *E.G.*, PETITIONER, AN ATTORNEY ACCUSED OF CRIMINAL CONTEMPT, HAS A SUBSTANTIVE OR PROCEDURAL DUE PROCESS RIGHT TO A FAIR AND IMPARTIAL JUDGE 11

II. WHETHER, CONSISTENT WITH THE CONSTITUTION'S DUE PROCESS REQUIREMENTS, A JUDGE MAY SIMULTANEOUSLY ACT AS AN INVESTIGATOR, WITNESS, PROSECUTOR AND JUDGE IN A CRIMINAL CONTEMPT TRIAL 16

CONCLUSION 23

LEGEND 26

APPENDIX ..... ia

TABLE OF AUTHORITIES

PAGE(S)

CASES:

Aetna Life Ins. Co. v. Lavoie,
475 U.S. 813, 106 S. Ct. 1580 (1986) 17

Albright v. Oliver,
510 U.S. 266, 114 S. Ct. 807 (1994) 13, 14, 16

Baker v. McCollan,
443 U.S. 137, 99 S. Ct. 2689 (1979) 12

Bracy v. Gramley,
520 U.S. 899, 117 S. Ct. 1793 (1997) 16

Charfauros v. Bd. of Elections,
249 F.3d 941 (9th Cir. 2001) 12

Chester C. Fosgate Co. v. Kirkland,
19 F. Supp. 152 (D.C. Fla. 1937).....20

Collins v. Harker Heights,
503 U.S. 115, 112 S. Ct. 1061 (1992) 13

Crawford v. Washington,
541 U.S. 36, 124 S. Ct. 1354 (2004) 5

DePiero v. City of Macedonia,
180 F.3d 770 (6th Cir. 1999) 11

Gage v. State,
295 Ark. 337, 748 S.W.2d 351 (1988) 5

Goldberg v. Kelly,
397 U.S. 254, 90 S. Ct. 1011 (1970) 12

Gray v. Mississippi,
481 U.S. 648, 107 S. Ct. 2045 (1987) 16

Holloway v. Walker,
784 F.2d 1287 (5th Cir. 1986) 11

Hurtado v. California,
110 U.S. 516, 4 S. Ct. 111 (1884) 14

In re Murchison,
349 U.S. 133, 75 S. Ct. 623 (1955) 16, 17

In re Richardson,
247 N.Y. 401, 160 N.E. 655 (1928) 19

Ivy v. Keith,
351 Ark. 269, 92 S.W. 3d 671 (2002) 6

Johnson v. Mississippi,
403 U.S. 212, 91 S. Ct. 1778 (1971) 22

Johnson v. United States,
333 U.S. 10, 68 S. Ct. 367 (1948) 13

Johnston v. City of Pine Bluff,
258 Ark. 346, 535 S.W.2d 76 (1975) 5

Knapp v. Kinsey,
232 F.2d 458 (6th Cir. 1956) 12

Marshall v. Jerrico, Inc.,
446 U.S. 238, 100 S. Ct. 1610 (1980) 11

Matter of Demjanjuk,
584 F. Supp. 1321 (D.C. Ohio 1984) 12, 13

Mayberry v. Pennsylvania,
400 U.S. 455, 91 S. Ct. 499 (1971) 16, 17

Medlock v. State,
328 Ark. 229, 942 S.W.2d 861 (1997) 5

Moran v. Clarke,
296 F.3d 638 (8th Cir. 2002).....14, 15

Offutt v. United States,
348 U.S. 11, 75 S. Ct. 11 (1954) 22

Palko v. Connecticut,
302 U.S. 319, 58 S. Ct. 149 (1937) 15

Perroni v. State,
2004 WL 1354268 (Ark. June 17, 2004).....5

Reserve Mining Co. v. Lord,
529 F.2d 181 (8th Cir. 1976) 16

Stretton v. Disciplinary Bd. of the Supreme Court of Pa.,
944 F.2d 137 (3rd Cir. 1991).....22

Taylor v. Hayes,
418 U.S. 488, 94 S. Ct. 2697 (1974) 22

Tumey v. Ohio,
273 U.S. 510, 47 S. Ct. 437 (1927) ..... *passim*

U.S. v. Jordan,
49 F.3d 152 (5th Cir. 1995) 12

United States v. Joyce,
498 F.2d 592 (7th Cir. 1974) 20

United States v. Sciuto,
531 F.2d 842 (7th Cir. 1976) 12

United States v. Vlahos,
33 F.3d 758 (7th Cir. 1994) 23

Weiler v. Purkett,
137 F.3d 1047 (8th Cir. 1998) (en banc) 14

Withrow v. Larkin,
421 U.S. 35, 95 S. Ct. 1456 (1975) 16

CONSTITUTIONAL PROVISIONS:

U.S. CONST. amend. IV 14

U. S. CONST. amend. V 2, 21, 12

U. S. CONST. amend. VI 2, 5

U. S. CONST. amend. XIV ..... *passim*

STATUTE:

42 U.S.C. § 1983 ..... 3, 12, 13, 14

OTHER AUTHORITY:

Leslie W. Abramson,
The Judicial Ethics of Ex Parte and
Other Communications,
37 Hous. L. Rev. 1343 (Winter 2000) 19

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2004

No. 04-_____

PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

OPINIONS DELIVERED BELOW

The majority opinion of the 4 to 3 Arkansas Supreme Court decision (Appendix pp. 1a-14a) is reported at 2004 WL 1354268 (Ark. June 17, 2004). The dissenting opinion of Justice Thornton (Appendix pp. 15a-36a), and the dissenting opinion of Justice Imber (joined by Justice Brown) (Appendix pp. 37a-44a), are also reported at 2004 WL 1354268 (Ark. June 17, 2004). The trial court's unreported decision finding Petitioner to be in contempt of court is reprinted herein. (Appendix pp. 45a-53a).

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The trial court adjudged Samuel A. Perroni, Petitioner, guilty of willful criminal contempt. Perroni filed a timely appeal (Appendix pp. 58a-59a) to the Arkansas Supreme Court which, in a 4 to 3 decision, affirmed the trial court's holding. The Arkansas Supreme Court's decision was filed on June 17, 2004. Rehearing was denied on September 9, 2004 and the mandate was recalled on

September 30, 2004 pending appeal to this Court. (Appendix 56a-57a). Pursuant to U. S. Supreme Court Rule 13.3, this Petition was filed within 90 days of the rehearing denial of the Arkansas Supreme Court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257. Jurisdiction was vested in the Arkansas Supreme Court and the trial court under state law.

The United States has not intervened in this case.

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. CONST. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U. S. CONST. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unites States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner, Samuel A. Perroni, a distinguished trial lawyer, represented Richard Ross in a complicated criminal tax fraud case pending in Pulaski County, Arkansas Circuit Judge David Bogard's Court. Originally set for trial in August, 2002, the trial was continued at the Court's request (AB 3)[1] and on the prosecutor's motion without objection from Perroni or his client (AB 3) because of a scheduling conflict that the Court had with a capital murder trial. (AB 3). Thus, Ross's speedy trial clock in state court did not begin to tick. Had Perroni objected, the prosecutor may have been forced to dismiss its case against Ross.

After Judge Bogard retired in January, 2003, the *Ross* case was set for trial in February, 2003, before the newly-elected Judge Timothy Fox. This date, however, created a potential conflict for Perroni, since he was required to be present in the United States District Court for the Eastern District of Arkansas before Judge Susan Webber Wright for a trial in the case of *U.S. v. Steven A. Pirani, et al.*, to commence the day before the *Ross* trial. The prosecutor in the *Ross* case, apparently appreciating Perroni's dilemma, did not object to a postponement. (AB 10). Thus, Perroni filed a Motion for Continuance in the *Ross* trial. (AB 4).[2] Judge Fox denied this Motion less than a week before trial.

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[1] References made throughout this Petition to materials within either the Record or Briefs below (*e.g.*, "AB" = Abstract of the Record below, "ARG" = argument contained in Petitioner's Brief below, etc.) but not contained within the Appendix herein are abbreviated and explained in the Legend, which can be found *infra*.

[2] In fact, Perroni made three (3) requests for a continuance before Judge Fox between January 31, 2002, and February 10, 2003. (AB 1, 3, 10). All motions were unopposed by the State, yet all motions were summarily denied by Judge Fox. (AB 1, 2, 10).

Since Perroni, however, was trying a case before the United States District Court, he could not appear in the *Ross* case. When Perroni did not appear (as Judge Fox knew that he could not), Judge Fox ordered him to show cause why he should not be held in criminal contempt. Through counsel, Perroni requested discovery, a trial by jury[3] and Judge Fox's

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[3] Perroni's request for a jury trial was made pursuant to the Arkansas Constitution, Art. 2 § 7; *Medlock v. State*, 328 Ark. 229, 233, 942 S.W.2d 861, 863-64 (1997); *Johnston v. City of Pine Bluff*, 258 Ark. 346, 347, 535 S.W.2d 76 (1975); and U. S. CONST. amend. VI. In affirming Perroni's conviction a majority of the Arkansas Supreme Court held that Perroni was not entitled to a jury trial under the Sixth Amendment. *Perroni v. State*, 2004 WL 1354268 (Ark. June 17, 2004). The Arkansas Supreme Court failed to address the issue of Perroni's right to a jury trial under the Arkansas Constitution. In Perroni's Petition for Rehearing he raised this oversight as well as the fact that the majority failed to address other appellate issues. (Appendix pp. 61a-66a). In a 4 to 3 decision the Arkansas Supreme Court denied the petition (Appendix p. 54a), but in doing so the author of the majority opinion, Justice Glaze, wrote Perroni's counsel a letter stating:

> Because the appellant Perroni offers nothing new that was not already considered in his original briefs, the court denies Mr. Perroni's petition for rehearing. However, the following citation of authority is inserted at the end of the third sentence in the first full paragraph of the slip opinion on page 11 (Ark. June 17, 2004) which reads as follows:
>
> See *Gage v. State*, 295 Ark. 337, 748 S.W.2d 351 (1988) (the court need not consider arguments where the other evidence against the appellant was overwhelming; even an error of constitutional proportions will not require reversal if it is harmless beyond a reasonable doubt).

(Appendix p. 55a). In other words, since Perroni was "obviously guilty," a jury trial and impartial judge were apparently unnecessary. However, as Justice Scalia put it for the seven justice majority in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354,

recusal.[4] Judge Fox denied these Motions.[5]

1371 (2004), "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." See also *Tumey v. Ohio*, 273 U.S. 510, 535, 47 S. Ct. 437, 445 (1927) ("No matter what the evidence was against him, he had the right to have an impartial judge").

[4] Judge Fox was requested to recuse five (5) times before he unilaterally held Perroni in criminal contempt. Judge Fox's impartiality was questioned in several respects, including his *ex parte* investigations of the charge against Perroni. (AB 13, 35, 53, 60, 66). This point, as well as Judge Fox assuming the role of prosecutor and witness, was raised but not considered by the Arkansas Supreme Court majority even though the author of the majority opinion in Perroni's appeal had previously opined in a case that:

> In a proceeding for indirect contempt, like the one here, it is not proper for the trial judge to initiate his own investigation, or act on the presumption that a party (Ivy) has violated a court order and then notify the party to appear to show cause why he should not be held in civil contempt. To condone such a procedure would be nothing short of adopting an inquisitorial system whereby the judge conducts the trial, determines what questions to ask, and defines the scope and the extent of the inquiry. That is not our system.

Ivy v. Keith, 351 Ark. 269, 288, 92 S.W. 3d 671, 682-683 (2002) (Justice Glaze, concurring in part and dissenting in part).

[5] After holding Perroni in criminal contempt Judge Fox recused. (ADD 117; Appendix p. 26a). It is inexplicable why there was sufficient reason for Judge Fox to recuse immediately after holding Perroni in contempt when there was supposedly not sufficient evidence to recuse (despite repeated requests) prior to that holding.

Perroni then appealed, arguing that Judge Fox denied him a fair trial, i.e., due process of law, by conducting an *ex parte* investigation, prejudging the case, and serving as a witness and the prosecutor against Perroni. (ARG 2, 4, 6, 7, 15, 18, 19, 20 & 25). In a motions hearing conducted on March 5, 2003, not only was the prosecutor not present at the commencement of the hearing, but Judge Fox denied Perroni's Motion to Disqualify the Prosecuting Attorney's Office by stating: "The prosecutor is not prosecuting this matter. [T]he court will be making the inquiry to the extent that any inquiry is required. So the prosecutor will not be prosecuting this matter." (AB 47). In responding to Perroni's Motion for Exculpatory Evidence, Judge Fox further added: "[T]he prosecutor is not involved, so I will deny the motion for exculpatory evidence." (AB 50). Judge Fox stated once more that "the prosecutor is not involved in this matter" when he denied Perroni's Motion to Conduct Discovery. (AB 51). Moreover, at the commencement of the March 14, 2003 contempt trial, the prosecutor was, once again, not present. (AB 53). When the prosecutor's absence was brought to Judge Fox's attention, Judge Fox responded: "[I]t is my understanding that in a contempt proceeding of this nature, that it is the court's responsibility to actually conduct the trial." (AB 54).

Once the trial began, Judge Fox introduced and admitted pleadings into evidence that his law clerk had purchased at Judge Fox's direction using Judge Fox's personal funds (AB 81) through an independent, *ex parte* investigation at the U.S. District Clerk's office. (AB 55-57). In other words, in conducting his independent, *ex parte* investigation, Judge Fox took affirmative steps in violation of the Judicial Canons to gather additional evidence not presented to him through proper judicial proceedings. (AB 55-57). Judge Fox admitted the federal pleadings into evidence against Perroni and relied upon them in finding

Perroni guilty of willful criminal contempt. (ADD 55-60). Indeed, at the commencement of the trial, Judge Fox stated his findings of fact before any evidence had even been considered. (AB 55-60).

Forced to proceed, Perroni called the Honorable William R. Wilson Jr., a United States District Judge, to testify in his defense as a character witness. Nonetheless, Judge Fox, acting as judge, witness, investigator, and prosecutor, found Perroni in criminal contempt and sentenced him. (AB 69-71). Specifically, on May 14, 2003, Judge Fox entered an Order finding Perroni in willful contempt and ordered Perroni to pay $780.00 as reimbursement for jurors' fees, $443.72 to reimburse the prosecutor's office for various fees, $55.20 to reimburse Pulaski County for copying and certifying federal court pleadings (the *Pirani* pleadings), and a $1,000.00 fine. Appendix pp. 52a-53a.

The prosecutor's absence at the commencement of the hearings and the prosecutor's nonexistent role in the proceedings against Perroni illustrate the fact that Judge Fox acted as both the fact-finding prosecutor and judge in the matter. In doing so, Judge Fox became enmeshed in a conflict of interest that prevented him from sitting as a fair and neutral referee. Furthermore, use of his own personal funds to purchase the federal pleadings, i.e., the evidence, utilized against Perroni in the contempt case further establishes Judge Fox's lack of impartiality and personal interest in the contempt proceedings. (AB 81). As a result, Perroni argued that his constitutional right to an impartial fact finder was violated by Judge Fox's insistence in assuming the role of prosecutor against him. (ARG 2-4).

Judge Fox also denied Perroni a fair trial when he served as a witness in the contempt trial. Again, during the trial, Judge Fox introduced certified copies of the pleadings

from the U.S. District Clerk's office that he had procured from his independent, *ex parte* investigation. (AB 55-60). While introducing the federal pleadings, which were not part of his Court's files in the *Ross* case, Judge Fox described them at length and detailed his interpretation of the consequences that the pleadings had in the contempt trial. (AB 55-60). Even before entertaining arguments as to the admissibility of the pleadings, Judge Fox commented on the pleadings and their relevance. (AB 55-60). For example, in describing Perroni's Motion for Continuance submitted to the U.S. District Court, Judge Fox stated: "On August 9th, 2002, Sam Perroni filed a motion for continuance on behalf of his client, Steven Pirani, in the federal *Pirani* case." (AB 56). However, Judge Fox, in what can only be described as testimony, then added: "The filing of the motion for continuance in the federal *Pirani* case was only four days after Mr. Perroni executed the scheduling order in the state court *Ross* case." (AB 56). Judge Fox's testimony continued when he incorrectly concluded: "From the entry of the [U.S. District Court's] September 4, 2002 *Pirani* scheduling order [which rescheduled the *Pirani* trial for February 10, 2003], Sam Perroni had a scheduling conflict with the *Pirani* setting on February 10th, 2003, and the *Ross* setting on February 11th, 2003." (AB 56-57).

In introducing the exhibits, Judge Fox also provided other testimony in the hearing. (AB 55-60). For instance, Judge Fox stated that:

> [a]t all times from September 4, 2002, through February 10, 2003, Sam Perroni's client, Steven Pirani, was scheduled to appear for trial in federal court beginning February 10, 2003. Sam Perroni did not file a motion for continuance in the *Ross* case in September, October, November, or December of 2002, while Judge David Bogard was presiding.

(AB 57). Judge Fox added more commentary:

> In the Order filed on January 17th of 2003 in the *Pirani* case, the district court again recited that the trial of such case was set for February 10, 2003. Mr. Perroni did not file a motion for continuance or a motion to be relieved as counsel in the *Ross* case after the entry of the January 17th *Pirani* Order. Mr. Perroni evidently never filed a motion for continuance in the *Pirani* case because of the scheduling conflict with the *Ross* trial setting.

(AB 57). Lastly, Judge Fox commented: "Mr. Perroni's failure to appear at the *Ross* trial caused the delay and rescheduling for one or more matters set for trial subservient to the *Ross* first-out, four day jury trial setting." (AB 59).

Arguing the above actions violated his right to a fair trial, i.e., his right to due process,[6] Perroni contends that Judge Fox simultaneously served as prosecutor, witness, investigator, and judge in Perroni's criminal contempt trial. Perroni now petitions for a Writ of Certiorari from this Court to review the 4 to 3 decision of the Arkansas Supreme Court.

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[6] See footnote 10, *infra*.

ARGUMENT

I. WHETHER A DEFENDANT IN A CRIMINAL TRIAL, *E.G.*, PETITIONER, AN ATTORNEY ACCUSED OF CRIMINAL CONTEMPT, HAS A SUBSTANTIVE OR PROCEDURAL DUE PROCESS RIGHT TO A FAIR AND IMPARTIAL JUDGE.

Rule 10(a) of the Rules of this Court indicates that among the reasons the Court considers in granting a writ of certiorari is when a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same issue. Rule 10(b) also provides that certiorari is proper when a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or a United States Court of Appeals.

With this in mind, in *Holloway v. Walker*, 784 F.2d 1287 (5th Cir. 1986), the Fifth Circuit Court of Appeals held that the right to an impartial judge was procedural in nature.[7] However, in favorably ruling for a party who had argued that he was deprived of a substantive right under the Due Process Clause of the Fourteenth Amendment to have a disinterested judge preside in a criminal case, the Sixth Circuit in *DePiero v. City of Macedonia*, 180 F.3d 770, 776-77 (6th Cir. 1999) appeared to recognize that the right to

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[7] *Holloway* cites *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S. Ct. 1610, 1613 (1980) for this proposition. *Holloway*, 784 F.2d at 1293. However, *Marshall* did not conclusively nor directly resolve this issue, nor did it state that the Due Process Clause's requirement of an impartial judge could never be substantive in nature.

an impartial judge was substantive in nature.[8] Indeed, courts have often spoken of the right to an impartial judge as a "fundamental" one. See, *e.g.*, *Charfauros v. Bd. of Elections*, 249 F.3d 941, 957 (9th Cir. 2001) ("The right to an impartial decision maker is a fundamental right which requires due process of law before it is denied." (*citing Goldberg v. Kelly*, 397 U.S. 254, 271, 90 S. Ct. 1011, 1022 (1970)); *U.S. v. Jordan*, 49 F.3d 152, 155 (5th Cir. 1995) ("the right to a fair and impartial trial is fundamental to the litigant; fundamental to the judiciary is the public's confidence in the impartiality of our judges and the proceedings over which they preside."); *Knapp v. Kinsey*, 232 F.2d 458, 465 (6th Cir. 1956) ("One of the most fundamental rights of a litigant under our judicial system is that he is entitled to a fair trial in a fair tribunal, and that fairness requires an absence of actual bias or prejudice in the trial of the case. . . . If this basic principle is violated the judgment must be reversed.") (internal citations omitted).

In this case, the issue of whether this interest is a procedural or substantive right is important. For example, 42 U.S.C. § 1983, while "not itself a source of substantive rights," provides "a method for vindicating federal rights elsewhere conferred." *Baker v. McCollan*, 443 U.S. 137, 144, n. 3, 99 S. Ct. 2689, 2694, n.3 (1979). The first step in analyzing any such claim is to identify the specific constitutional right infringed. *Id.*, 443 U.S. at 140, 99 S. Ct. at 2692. Perroni's claim before this Court is that the actions of Judge Fox violated his substantive due process right to be free from criminal prosecution via a trial presided over by a patently biased and interested judge. If this Court rules that

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[8] See also *Matter of Demjanjuk*, 584 F. Supp. 1321, 1324 (D.C. Ohio 1984) ("It has long been recognized that freedom of a tribunal from bias or prejudice is an element of substantive due process accorded litigants under the Fifth Amendment.") (emphasis added) (*citing United States v. Sciuto*, 531 F.2d 842, 845 (7th Cir. 1976)); *Knapp v. Kinsey*, 232 F.2d 458, 465 (6th Cir. 1956).

freedom from a biased, prejudiced tribunal is in fact an element of substantive due process, see, *e.g.*, *Matter of Demjanjuk*, then Perroni and similarly-situated individuals may be entitled to state a cause of action under 42 U.S.C. § 1983 for infringement of this right in situations such as the one presented at bar.

While Perroni recognizes that this Court has been "reluctant to expand the concept of substantive due process because the guideposts for responsible decision making in this unchartered area are scarce and open-ended[,]" *Collins v. Harker Heights*, 503 U.S. 115, 125, 112 S. Ct. 1061, 1068 (1992), Perroni submits that the deprivation of something so fundamental as a fair and impartial judge in a criminal trial is so serious and of such a magnitude as to constitute a deprivation of liberty meriting constitutional protection. In Perroni's trial below (as set forth in the Statement of the Case and as discussed more in depth *infra*), Judge Fox discarded his judicial robe[9] and became not only a judge, but a prosecutor, an investigator and a witness. This case thus presents this Court with the exceptional case of describing the bounds, as well as the intersection, of procedural and substantive due process.

For instance, in *Albright v. Oliver*, 510 U.S. 266, 274, 114 S. Ct. 807, 813 (1994), a plurality of this Court declined to recognize that the petitioner (who had filed a claim under 42

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[9] This Court has held that "inferences [of probable cause must] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14, 68 S. Ct. 367, 369 (1948). If that is the case, then surely a deprivation of due process occurs when the very party to this proceeding, i.e., Judge Fox, who is presiding over Perroni's contempt hearing is the same party who initiated, investigated, and adduced evidence supposedly supporting the contempt charge.

U.S.C. § 1983) had a substantive right under the Due Process Clause of the Fourteenth Amendment to be free from criminal prosecution except upon probable cause, holding that such a substantive due process right did not exist on account of the Fourth Amendment already providing protection against this sort of governmental conduct. *Id.*, 510 U.S. at 273, 114 S. Ct. at 813 ("[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims") (internal quotations and citation omitted). However, unlike *Albright*, the fundamental liberty interest at issue in this case cannot be identified as having a protective counterpart in the specific guarantees of the Bill of Rights, such that violations of this interest may go unremedied without a holding that the interest is an aspect of substantive due process. Indeed, when this Court held long ago that a fair trial required the presence of an impartial judge, *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437 (1927), it did not do so by citing to an explicit provision of the Bill of Rights but instead by relying upon the Due Process Clause itself. See also *Albright*, 510 U.S. at 303, 114 S. Ct. at 828 (STEVENS, J., dissenting) ("'bulwarks' of protection such as the Magna Carta and the Due Process Clause 'guarantee not particular forms of procedure, but the very substance of individuals' rights to life, liberty, and property.'") (*citing Hurtado v. California*, 110 U.S. 516, 532, 4 S. Ct. 111 (1884)).

With this in mind, "[t]he Fourteenth Amendment guarantees '[s]ubstantive due process [,which] prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty.'" *Moran v. Clarke*, 296 F.3d 638, 643 (8th Cir. 2002) (alterations in original) (*quoting Weiler v. Purkett*, 137 F.3d 1047, 1051 (8th Cir. 1998) (en banc)). Here, Perroni

urges this Court to find that he and similarly situated defendants have a substantive due process right to a fair and impartial judge since such right is surely "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S. Ct. 149, 152 (1937).

Moreover, in determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance the liberty of the individual and the demands of an organized society. Again, courts identify the individual liberty interests at stake and the established demands of an organized society at issue. *Moran*, 296 F.3d at 643-44. Courts then analyze, qualitatively, whether the interests asserted are sufficiently important for substantive due process consideration. *Id.* at 644. Ultimately, within this context, courts assess whether the government's contested actions are conscience shocking. *Id.* Under any standard, Judge Fox's actions in fulfilling multiple roles in Perroni's trial were conscience shocking and unacceptable in our legal system.

This Court should therefore grant the Petition to establish the right to an impartial judge as a matter of substantive due process, *i.e.*, that an individual has a substantive right under the Due Process Clause of the Fourteenth Amendment to be free from a criminal prosecution presided over by a biased, partial judge. Should this Court refuse to review this matter and hold as much, courts may quite likely conclude that Perroni, and (prospectively) other persons similarly situated, have no right to maintain a federal action for denial of their due process rights.

II. WHETHER, CONSISTENT WITH THE CONSTITUTION'S DUE PROCESS REQUIREMENTS, A JUDGE MAY SIMULTANEOUSLY ACT AS AN INVESTIGATOR, WITNESS, PROSECUTOR AND JUDGE IN A CRIMINAL CONTEMPT TRIAL.

Justice Scalia "can conceive of many abuses of the trial process (for example, the use of a patently biased judge)," *Albright v. Oliver*, 510 U.S. 266, 275, 114 S. Ct. 807, 814 (1994) (Scalia, J., concurring) (*citing Mayberry v. Pennsylvania*, 400 U.S. 455, 465-66, 91 S. Ct. 499, 504-05 (1971)) that may cause a criminal sentence to be a deprivation of life, liberty or property without due process. Unfortunately, Perroni cannot only conceive of the abuses – he has experienced them.

The Due Process Clause guarantees a criminal defendant the right to a fair trial, including an impartial judge. *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625 (1955).[10] This Court has found that due process requires

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[10] The right to a fair and impartial judge is central to the guaranteed due process right of a fair trial under the Fifth and Fourteenth Amendments to the U.S. Constitution. *Bracy v. Gramley*, 520 U.S. 899, 904-05, 117 S. Ct. 1793, 1797 (1997) ("... the floor established by the Due Process Clause clearly requires a 'fair trial in a fair tribunal,' *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S. Ct. 1456, 1464 (1975), before a judge with no actual bias against the defendant or interest in the outcome of his particular case."); *Gray v. Mississippi*, 481 U.S. 648, 668, 107 S. Ct. 2045, 2057 (1987) (impartiality of the adjudicator goes to the very integrity of the legal system); *Murchison*, 349 U.S. at 136, 75 S. Ct. at 625 (the constitutional point is that a "fair trial in a fair tribunal is a basic requirement of due process"); *Tumey v. Ohio*, 273 U.S. 510, 535, 47 S. Ct. 437, 445 (1927) ("No matter what the evidence was against him, he had the right to have an impartial judge"); *Reserve Mining Co. v. Lord*, 529 F.2d 181, 185-86 (8th Cir. 1976) ("Judge Lord seems

disqualification of a judge if he has direct financial interests in the outcome of a case (see, *e.g.*, *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822-24, 106 S. Ct. 1580, 1585-86 (1986) and *Tumey v. Ohio*, 273 U.S. 510, 520-23, 47 S. Ct. 437, 440-41 (1927)), if he is faced with substantial direct personal insults from a litigant (see, *e.g.*, *Mayberry v. Pennsylvania*, 400 U.S. 455, 466, 91 S. Ct. 499, 505 (1971)), or if he had significant prosecutorial and adjudicatory functions in the same case (see, *e.g.*, *Murchison*, 349 U.S. at 134-36, 75 S. Ct. at 624-25). The cases requiring disqualification involve "direct, personal [and] substantial" influences on the judges involved. *Aetna*, 475 U.S. at 822, 106 S. Ct. at 1585. Such evidence is present in this case.

On February 11, 2003, Ross appeared for his trial, but Perroni, who had started the *Pirani* trial in federal court the day before, was unable to appear. Judge Fox promptly ordered Ross, who had been released on bond, incarcerated. (AB 9). [11] Once Ross was incarcerated, Perroni's law partner, Patrick R. James, made a special appearance during the afternoon of February 11, 2003, for the purpose of conducting a bond hearing. (AB 11-24). During the hearing, James made requests for Ross's immediate release; however, Judge Fox denied James's requests and persisted in incarcerating Ross. (AB 22). Since Judge Fox was already scheduled to conduct Ross's trial on the following day, James further requested that the Court conduct Ross's bond hearing on the following morning. (AB 22-23). Judge Fox

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to have shed the robe of the judge and to have assumed the mantle of the advocate. The court thus becomes lawyer, witness and judge in the same proceeding, and abandons the greatest virtue of a fair and conscientious judge – impartiality.")

[11] Dissenting Justice Ray Thornton found that incarcerating Ross was the product of "animus and retaliation" against Perroni and that Judge Fox should have recused at the time that Ross's incarceration was considered. Appendix pp. 25a-26a.

refused and scheduled a bond hearing for three days later on February 14, 2003. (AB 23). At the close of the hearing, James requested that Judge Fox enter his rulings in a formal, written Order so that an immediate writ of habeas corpus could be filed. (AB 24).

Later that afternoon, Judge Fox contacted both James and the prosecutor to notify them that his office had investigated Ross's bond and that he had scheduled a hearing concerning Ross's bond for the following morning. (AB 24-25). During the February 12, 2003 hearing, Judge Fox stated:

> Since no one else was evidently going to check with the bonding company, I had my staff call the bonding company. It was reported that the purpose of the call was to request an affirmation that even though court had begun, that [Ross's] bonding company would send us a letter agreeing to remain on the bond until the next setting, whenever it might be. There was an indication to my staff to the contrary, that the bonding company might take the position that they had been relieved since court had begun and the defendant had appeared.
>
> * * * *
>
> My staff contacted [the bonding company] again this morning and was advised that evidently someone on behalf of [Ross] had, in fact, contacted them late yesterday afternoon, and that there was going to be an agreement and a letter in writing that they would remain on the bond pending the next trial setting, whenever we could get that.

(AB 24-25). These comments clearly establish that Judge Fox and his office had independently investigated Ross's bond.

Judge Fox also admitted in the hearing to a second investigation. (AB 32). In informing James that he was issuing an Order to Show Cause to Perroni and that Perroni would need to find time to personally sign for it in Judge Fox's office, Judge Fox further stated: "I noticed in the paper this morning, [the Federal Court doesn't] start until nine." (AB 32). By his statement, Judge Fox was specifically referring to the *Pirani* trial. In light of Judge Fox's lack of impartiality, Perroni filed a Motion to Suggest Recusal. (ADD 37-39; 56-63). In the Motion, Perroni alleged that Judge Fox had violated Canon 3[12] of the Code of Judicial Conduct[13] by independently investigating facts in both

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12 The Commentaries to Canon 3B(7) of the Arkansas Code of Judicial Conduct provide: "Certain ex parte communication is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage ex parte communication and allow it only if all the criteria stated in Section 3B(7) are clearly met. A judge must disclose to all parties all ex parte communications described in Sections 3B(7)(a) and 3B(7)(b) regarding a proceeding pending or impending before the judge. A judge must not independently investigate facts in a case and must consider only the evidence presented." (emphasis added); see also Appendix p. 33a.

13 Chief Justice Cardozo has stated that the function of judges is "'to determine controversies between litigants.'" Leslie W. Abramson, The Judicial Ethics of Ex Parte and Other Communications, 37 Hous. L. Rev. 1343, 1367 (Winter 2000) (*quoting In re Richardson*, 247 N.Y. 401, 411, 160 N.E. 655, 658 (1928)). Judges are not "adjuncts or advisers, much less investigating instrumentalities, of other agencies of government." *Id.* After all, a "judge is [not] a prosecutor. . . . He is [not] to follow trails of suspicion, to uncover hidden wrongs, to build up a case as a prosecutor builds one . . . . No doubt he is to act

Ross's case and in the *Pirani* case, the federal case in which Perroni's presence was required by federal court order,[14] as opposed to considering only the evidence presented. Perroni stated that Judge Fox's "comments regarding [his] following of the [*Pirani*] case in the newspaper and determining the time of commencement of the federal trial" created an appearance and presumption of impropriety, suggesting that Judge Fox had conducted an independent investigation of the *Pirani* proceedings.

Undeterred by Perroni's specific identification of Canon 3's prohibitions against independent investigations, on March 10, 2003, Judge Fox sent his law clerk to the United States District Clerk's office to review the pleadings in the *Pirani* case and copy those pleadings so that they could be introduced as evidence against Perroni in his contempt trial. (AB 85-86). After instructing his law clerk, Judge Fox provided his law clerk with $20.00 "out of [his own] billfold." (AB 81). In obtaining the pleadings, the law clerk was forced to expend a total of $55.20; thus, in order to cover the additional costs, the law clerk wrote the Clerk's office a personal check in the amount of $35.20. (AB 81, 86). When the law clerk returned, Judge Fox reimbursed the law clerk directly "out of [his] billfold." (AB 81). Despite

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impartially, neither presenting from malice nor concealing from favor . . . . [H]is conclusion is [not] to be announced upon a case developed by himself." *Id.* (emphasis added); see also *Chester C. Fosgate Co. v. Kirkland*, 19 F. Supp. 152, 157 (D.C. Fla. 1937) ("It is a further fundamental element of due process of law that no judge shall try his own case.").

[14] The good faith inability to comply with an order, i.e., because one scheduled for trial in state court is simultaneously detained in trial in federal court, as contrasted with the refusal to comply with that order, is a complete defense in a criminal contempt action. See, *e.g.*, *United States v. Joyce*, 498 F.2d 592, 596 (7th Cir. 1974).

reimbursing his law clerk, Judge Fox never submitted a payment voucher to Pulaski County for reimbursement of the $55.20 expended to obtain the *Pirani* pleadings. (AB 81).[15]

At the opening of the March 14, 2003 contempt trial, Judge Fox rendered findings of facts and conclusions of law that resembled his findings and conclusions issued in his May 14, 2003 Order where he found Perroni guilty of criminal contempt. (AB 55-60). For example, immediately after introducing the Federal Court's September 4, 2002 Order that granted a continuance in the *Pirani* case, Judge Fox stated: "From the entry of the September 4, 2002 *Pirani* Scheduling Order, Sam Perroni had a scheduling conflict with the *Pirani* setting on February 10, 2003, and the *Ross* setting on February 11, 2003." (AB 56-57). Judge Fox's statement (which is facially incorrect) constituted a conclusion reached well in advance of the trial and well before Perroni was even made aware of Judge Fox's acquisition of the federal pleadings. As a result, Perroni, who was entitled to appear before a neutral and passive tribunal, recognized the futility in testifying on his own behalf before a judge who had already predetermined the case. Therefore, Perroni, who had plenty to say in his defense, never took the stand (as was his Fifth Amendment right to do so) during the contempt trial. (AB 52-66).

With this in mind, when a judge predetermines or prejudges a case, the judge fails to keep an open mind and give due consideration to the arguments and evidence produced by the parties, and in turn, violates a "cornerstone

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15 Notwithstanding the fact that Judge Fox had not sought reimbursement from the county for his out-of-pocket expense in purchasing certified copies of pleadings in the *Pirani* case, in sentencing Perroni he actually ordered that Perroni reimburse the county for that expense (an expense which in fact the county had not incurred). (AB 70); Appendix pp. 33a-34a, 53a.

of our legal system" by refusing to give the parties an opportunity to be heard. *Stretton v. Disciplinary Bd. of the Supreme Court of Pa.*, 944 F.2d 137 (3rd Cir. 1991). Bias arises when the judge becomes "personally embroiled" with the contemnor, *Offutt v. United States*, 348 U.S. 11, 17, 75 S. Ct. 11, 15 (1954), when he necessarily becomes embroiled in a running controversy with the contemnor so that he might naturally be expected to harbor "marked personal feelings," *Taylor v. Hayes*, 418 U.S. 488, 503, 94 S. Ct. 2697, 2705 (1974), or when he is in an adversary posture with the contemnor, even if he has not been personally attacked. *Johnson v. Mississippi*, 403 U.S. 212, 215-16, 91 S. Ct. 1778, 1779-80 (1971). It is not the contemnor's conduct alone which determines whether bias exists, but rather the character of the judge's response to such conduct. *Taylor*, 418 U.S. at 503 n. 10, 94 S. Ct. at 2705 n. 10.

During the March 14, 2003 contempt trial, the only exhibits introduced by Judge Fox against Perroni were the *Ross* pleadings (AB 55) and the pleadings in the *Pirani* trial obtained by Judge Fox through his independent, *ex parte* investigation. (AB 55-60). Judge Fox, who denied Perroni the opportunity to conduct discovery because Judge Fox believed that "[t]he only documents that [he could] think of [to introduce in the contempt hearing] would be documents that [were] currently in the [*Ross*] court file," (AB 52), admitted the *Pirani* pleadings into evidence over Perroni's objection. (AB 60). Regardless, Judge Fox utilized the federal pleadings, which were not contained within the *Ross* court file, to support his finding that Perroni was guilty of willful criminal contempt of court. (ADD. 60, 69).

Judge Fox introduced the federal pleadings, which he purchased with his own personal funds and which he obtained through means not provided to him as judge, and thereafter detailed his spin on the meaning of the pleadings without ever calling a witness. (AB 55-60). All of the

comments about the federal pleadings were provided not by a witness called by Judge Fox but were made by Judge Fox himself. (AB 55-60). In other words, comments regarding the federal pleadings derived solely from Judge Fox's interpretation of them. (AB 55-60). As a result, Judge Fox denied Perroni a fair trial in serving as judge, prosecutor, investigator and witness in the March 14, 2003 contempt trial.[16] *Tumey*, 273 U.S. at 534, 47 S. Ct. at 534 ("A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.").

Under this Court's precedents, Perroni clearly had a right to an impartial judge. Perroni did not have an impartial judge in this case. Unless this Court reviews this matter, both Perroni and (prospectively) other similarly situated defendants considered "overwhelming guilty" will nevertheless be denied the very cornerstone of our justice system- a fair trial before an impartial judge.

CONCLUSION

For the foregoing reasons, certiorari should issue to the Supreme Court of Arkansas so that this Honorable Court may review and correct the decision below.

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16 Perhaps this is the reason why courts have opined that a trial court's authority to initiate a criminal proceeding against an individual for contempt includes the authority to appoint a private attorney to actually prosecute the contempt. *United States v. Vlahos*, 33 F.3d 758, 762 (7th Cir. 1994).

Respectfully submitted,

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LEGEND[17]

Trial Court Record Abstract ..... AB

Arkansas Supreme Court Brief Argument ..... ARG

Arkansas Supreme Court Brief Addendum ..... ADD

Appendix ..... APP

[17] Under Arkansas appellate procedural rules, an "abstract," "argument," "addendum" and "appendix" are simultaneously filed with the clerk and considered by the Arkansas Supreme Court. References made throughout this Petition are to these documents.

APPENDIX
TABLE OF CONTENTS

PAGE

Opinion of
The Supreme Court of Arkansas
Re: Affirming Finding of Criminal Contempt
entered June 17, 2004 ..... 1a

Dissent of
The Honorable Ray Thornton
entered June 17, 2004 ..... 15a

Dissent of
The Honorable Annabelle Clinton Imber Joined by
The Honorable Robert Brown
entered June 17, 2004 ..... 37a

Order of
The Honorable Timothy D. Fox of
The Circuit Court of Pulaski County, Arkansas
Re: Finding Contempt of Court
entered May 14, 2003 ..... 45a

Letter Order to
Timothy O. Dudley from
The Supreme Court of the State of Arkansas
Re: Denying Petition for Rehearing
entered September 9, 2004 ..... 54a

Letter to
Vada Berger and Timothy O. Dudley from
The Honorable Tom Glaze
Re: Amending Opinion
dated September 9, 2004 ..... 55a

Recall of Mandate of
The Supreme Court of Arkansas
entered September 30, 2004 ..... 56a

Petitioner's Notice of Appeal
filed May 15, 2003 ..... 58a

Petition for Rehearing
dated July 2, 2004 ..... 60a

SUPREME COURT OF ARKANSAS
No. 03-878

SAMUEL A. PERRONI,
APPELLANT,

VS.

STATE OF ARKANSAS,
APPELLEE,

Opinion Delivered JUN 17 2004

AN APPEAL FROM THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS, NO. CR00-2498; HON. TIMOTHY DAVIS FOX, CIRCUIT JUDGE

AFFIRMED

[ENTERED: JUNE 17, 2004]

TOM GLAZE, Associate Justice

Attorney Samuel A. Perroni appeals Circuit Judge Timothy D. Fox's order finding Perroni in criminal contempt. This matter arises out of a felony tax fraud case that the State filed on July 1, 2000, in the Pulaski County Circuit Court, Sixth Division, against Richard Ross and two other defendants. Perroni represented Ross. Initially, Judge David Bogard was presiding judge, and there were five continuances granted, two of which were because of scheduling conflicts with cases Perroni had pending in

different federal district courts.[1] Finally, the Ross matter was set first out for a four-day jury trial to begin on February 11, 2003. On August 5,2002, both Perroni and Ross executed a notice order of the February 11 trial setting.

Meanwhile, Perroni undertook the representation of another defendant, Steve Pirani, who, along with two co-defendants, was charged in federal court with numerous felony offenses. Pirani, was indicted on July 25, 2002, arraigned on August 7, 2002, and Federal District Judge Susan Webber Wright initially set the Pirani trial to begin on September 4, 2002. However, Perroni promptly asked Judge Wright for a continuance, asserting that he had another federal court case scheduled to commence on September 16, 2002, in Federal District Judge Bill Wilson's court. Judge Wright accommodated Perroni by rescheduling the Pirani case to begin on February 10, 2003. For unknown reasons, Perroni did not advise Judge Wright that the February 10 date would conflict with the earlier setting of February 11, 2003, in the state court's Ross case.

The next relevant date and event occurred when, on January 6, 2003, Judge Wright entered an order noting that she had previously denied Steve Pirani's motion to sever, but asked the Government to explain its objection to severance. In her order, Judge Wright reconfirmed the February 10, 2003, trial setting. Again, Perroni never mentioned this conflict with the state court's February 11,

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[1] Perroni related that he could not recall why the first continuance was granted, but the second one was because the state court severed charges against Ross and the two other co-defendants. The third and fourth continuances were because of two separate defendants Perroni represented in different federal district courts whose trial settings conflicted with a trial setting in the Ross case. He further said that the fifth continuance was granted because the Ross trial was preempted by a capital felony murder case.

2003, trial setting. By way of a telephone conference with all counsel for the Government and defendants, on January 31,2003, Judge Wright noted in her order of the same date that she was advised that the defendants could be tried separately, and she directed that Steve Pirani's trial would commence with jury selection to begin on February 10, 2003, and Pirani's co-defendants would be tried afterwards. Again, the record reflects that Perroni failed to mention to Judge Wright the scheduling conflict he had regarding the Ross case in state court. Instead, Perroni waited until January 31, 2003, to ask the state circuit court judge for another continuance of the Ross case. At this stage of the proceedings in the Ross and Pirani cases, Circuit Judge Fox had been elected and replaced Judge Bogard, who had retired.

Judge Fox promptly set a hearing for February 4, 2003, to consider Perroni's motion for continuance, but, instead of appearing at the February 4 hearing, Perroni sent an associate. After Judge Fox denied the continuance Perroni's associate had requested, Perroni quickly moved for Judge Fox to reconsider his ruling; however, at another hearing set on February 5, 2003, Judge Fox refused to set aside his order denying a continuance. Perroni then moved to withdraw as Ross's counsel, and that request, too, was denied.

On February 10, 2003, Perroni had a letter delivered to Judge Fox, renewing his motions for continuance and to withdraw as counsel. He enclosed a copy of Judge Wright's scheduling order which reflected that Steve Pirani's trial was to begin February 10, 2003. On the day of trial, February 11, 2003, Ross appeared in court without counsel, although Perroni's law partner, Patrick James, appeared and advised that he was making a special appearance on Ross's behalf. The state prosecutor announced ready for trial, but the trial court continued the case and released the jury and the

State's witnesses because Ross said that he had been unable to obtain substitute counsel. Citing Ark. Code Ann. § 16-84-11 l(b) (Supp. 2003),[2] Fox ordered Ross to be held in custody pending further orders of the court. Judge Fox stated the case was in recess, and Ross could again be released upon an appearance bond, if the surety agreed to remain as the surety until final judgment was rendered.

On February 12,2003, Judge Fox issued an order to show cause why Perroni should not be held in contempt for failing to appear in court to represent Ross on February 11, 2003. Perroni responded by filing a motion suggesting Judge Fox's disqualification, alleging Judge Fox's impartiality might be questioned. Perroni alleged that Fox improperly did the following:

> (1) Illegally and unconstitutionally incarcerated Ross in what appears to be retaliation against his counsel, Perroni.
>
> (2) Inappropriately, adversarially, and aggressively took action against Perroni via the court's correspondence, treatment of counsel, and the issuance of an order to show cause.

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[2] Ark. Code Ann. § 16-84-11 l(b) provides:

> [F]or a felony *when a defendant is upon bail, he may remain upon bail or be kept in actual custody as the court may direct. If the defendant remains on bail, any surety's liability shall be exonerated unless the surety has agreed to remain as the surety until final judgment is rendered.* (Emphasis added.)

Perroni's motion also mentioned that he had been the treasurer for attorney Leon Johnson who was Fox's past opponent and candidate for circuit judge - a race Johnson lost. Perroni's partner, James, asserted that Judge Fox's action of placing Ross in jail was some type of retaliation against Perroni.

(3) Independently investigated facts in this case as opposed to considering only the evidence presented. This included an investigation of Ross's appearance bond and the pleadings filed in the Pirani case.

Perroni concluded by stating that Judge Fox and his staff were in an adversarial relationship which suggested Fox's impartiality might reasonably be questioned. Perroni requested an evidentiary hearing regarding his allegations, and Judge Fox set a hearing on March 14, 2003.

On March 14, 2003, a hearing was held, and Perroni's attorney renewed his earlier motions which Judge Fox again denied. Fox then recited the facts of the case, and Perroni called Federal Judge Bill Wilson to testify as a character witness. After Judge Wilson's testimony, Judge Fox and Perroni's attorney, Tim Dudley, turned their attention to the fact that Perroni had filed a removal motion in federal district court, and no further action could be conducted until the federal court decided to take the case or remand it back to the state circuit court. The federal court returned this case to Judge Fox's court, whereupon Fox found that Perroni had wilfully disobeyed Fox's scheduling order by not appearing with Ross at the February 11, 2003, trial. Judge Fox imposed the following sanctions:

(1) payment of $780.00 for reimbursement of the juror members who were called, had appeared, and were discharged in Ross's case;

(2) payment of the State's witness fees in the amount of $443.72;

(3) reimbursement of the costs of copying pleadings filed in the Pirani federal court case in the amount of $55.20; and

(4) payment of a fine of $1,000.00.

Perroni brings this appeal contending that (1) Judge Fox committed reversible error by-failing to recuse; (2) as a matter of law, there is a failure of evidence with regard to the charge of willful conduct; and (3) Judge Fox erred by failing to accord him his constitutional protections. In arguing his first point, Perroni offers six reasons that he believes merit reversal. He claims Judge Fox erred (1) by serving as a prosecutor; (2) by serving as a witness; (3) in prejudging Perroni's case; (4) by incarcerating Ross, which demonstrated animus and retaliation against Perroni; (5) by conducting an *ex parte* investigation of the facts; and (6) by demonstrating an appearance of impropriety. We first address Perroni's two general contentions involving recusal and contempt because the conclusions we reach on these two matters render it unnecessary to reach some of the subpoints Perroni raises.

Our law regarding recusal and contempt is well settled. When recusal is in issue, this court has held that a judge has a duty to sit on a case unless there is a valid reason to disqualify, and, on appeal, we presume impartiality on the trial judge's part. *See Walls v. State*, 341 Ark. 787, 20 S.W.3d 322 (2000); *Ark. Dep 't of Human Servs. v. R.P.*, 333 Ark. 516, 970 S.W.2d 225 (1998) (judges are presumed to be impartial, and the party seeking disqualification has the burden of showing otherwise). This court has also held the standard of review on appeal is whether the trial judge abused his or her discretion in the matter. *Osbome v. Power*, 318 Ark. 858, 890 S.W.2d 570 (1994).

Upon our review of the record, we hold that Perroni has failed to demonstrate the required bias on Judge Fox's part. While Perroni alleges Fox erred by serving as prosecutor and as a witness, in prejudging Perroni's case, in incarcerating Ross, and in conducting an *ex parte* investigation when preparing for a show-cause hearing, the primary issue is whether he disobeyed Judge Fox's scheduling order.

Arkansas law is settled that an act is contemptuous if it interferes with the order of the court's business or proceedings or reflects upon the court's integrity. *Allison v. DuFresne*, 340 Ark. 583, 12 S.W.3d 216 (2000). This court has also held that the disobedience of any judgment, order, or decree of a court having jurisdiction to enter it is such an interference with the administration of justice as to constitute contempt. *Ivy v. Keith*, 351 Ark. 269, 92 S.W.3d 671 (2002). For example, in *Johnson v. Johnson*, 343 Ark. 186, 33 S.W.3d 492 (2000), two prosecutors were in direct criminal contempt when they did not comply with a scheduling order and proceed to trial on the trial date. By adopting a rule of criminal procedure, this court has emphasized that control of the trial calendar is a matter that rests solely with the trial judge who shall provide for the scheduling of cases upon the calendar. *See* Ark. R. Crim. P. 27.2. Accordingly, this court has held that the scheduling of cases is tantamount to a direct order of the court, *id.*, *see also Rischar v. State*, 307 Ark. 429, 821 S.W.2d 25 (1991), and we have stated that the trial judges of this state have an obligation to assure that their courts are conducted in an orderly and correct manner. *See Florence v. Taylor*, 325 Ark. 445, 928 S.W.2d 330 (1996). Our court has also held that an attorney's failure to appear pursuant to a supreme court show-cause order was direct contempt. *Street v. State*, 331 Ark. 443, 959 S.W.2d 747 (1998).

The standard of review in a case of criminal contempt, as we have here, requires this court to view the record in the light most favorable to the trial judge's decision and to sustain that decision if it is supported by substantial evidence and reasonable inferences. *Etoch v. Simes*, 340 Ark. 449, 10 S.W.3d 866 (2000).

From a careful review of the record before us, one thing is quite clear and entirely undisputed: that Sam Perroni disobeyed Judge Fox's scheduling order. On August

5, 2002, both Perroni and his client, Ross, signed a notice order which set Ross's state criminal trial for four days beginning on February 11, 2003. Only two days after Perroni and Ross executed the state court's scheduling order, Perroni was apprised on August 7, 2002, by Federal District Court Judge Susan Webber Wright, that another of Perroni's defendants, Steve Pirani, was scheduled for a federal trial on September 4, 2002. However, Perroni immediately notified Judge Wright that he had another federal trial in a different federal district court that would conflict with the Pirani September 4 trial setting. Judge Wright then rescheduled the Pirani case to begin on February 10, 2003 - a date that conflicted with the February 11 setting in the Ross state case. In fact, the record fails to reflect that Perroni *ever* notified Judge Wright that the Pirani trial date conflicted with Perroni's Ross case in state court.

As pointed out earlier in this opinion, Perroni had numerous opportunities to bring the state trial conflict in Ross to Judge Wright's attention, but Perroni simply chose not do so. To make matters worse, Perroni waited until January 31, 2003, to ask Judge Fox for a new setting in the Ross case. Judge Fox held a hearing on Perroni's continuance motion on February 5, 2003, at which time the judge denied Perroni's motion. Perroni then moved to withdraw as Ross's counsel. Judge Fox denied that motion when Perroni explained that it would-be impossible for new counsel to be prepared to defend Ross by the February 11, 2003, trial date. The record reveals that, as early as August 7, 2002, and for approximately five months, Perroni knew that he had a scheduling conflict in the state Ross case and federal Pirani case, but Perroni never told Judge Wright, and waited to inform Judge Fox until only days before the respective cases were to be tried. At the February 5, 2003, hearing on Perroni's motion for continuance, Judge Fox informed Perroni that the Ross case was the oldest one on his docket, and needed to be tried. Perroni advised Judge

Fox that he did not have an actual conflict with the Pirani case until January 31, 2003, when Federal Judge Wright advised counsel that jury selection in the Pirani case would begin on February 10, 2003. When it became apparent that Fox was not going to grant a continuance, Perroni told Judge Fox that, "If you want, I'll file a motion for continuance with Judge Wright." Fox answered, "No, it's been the practice of this court, under the previous judge, that [attorneys] had to manage their own dockets."[3]

As already discussed above, this court has held that state trial judges have an obligation to assure their courts are conducted in an orderly and correct manner. The trial court does so by scheduling cases, which is tantamount to a direct order of the court, and the disobedience of that order is such an interference with the administration of justice as to constitute contempt.

Here, Perroni asserts that he did everything he could to address and alleviate the scheduling conflict regarding the Ross and Perani cases, but his assertion is not borne out by his own assessment of the facts. As previously noted, Perroni concedes that nowhere in the record is it shown that he ever informed Judge Wright that the state case of *Ross v. State* had been set prior to the Pirani case, even though Perroni had many opportunities to do so. If Perroni had

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[3] At the March 14,2003, hearing on the show-cause order, Judge Fox clarified these comments, stating as follows:

> My understanding of the question, the tone in which it was asked at that time, was that Mr. Perroni was attempting to get this court to order him to file a motion for continuance so that he could represent to Judge Wright that that's what had happened. It's not this court's obligation to manage Mr. Perroni's litigation practice, and it's certainly not - he's not entitled to use the authority of this court to represent to some other judge that that's what has been ordered.

done so, and Judge Wright had refused to continue or to reset the Pirani case on her docket, then perhaps Perroni's argument may have had some merit.

It is most reasonable and plausible to believe Judge Wright would have deferred to the State to try its case first, since it was set prior to Pirani's case and the Ross case was the oldest active case on the state court's docket. It is equally reasonable for Judge Fox to reject Perroni's last minute "offer" to advise Judge Wright that *Judge Fox wanted Perroni* to file a continuance motion in the Pirani case. At this late stage of the Ross and Pirani cases, it was Perroni's responsibility, not Judge Fox's, to let Judge Wright know how Perroni got himself into this conflict situation. Again, Perroni repeatedly conceded he *never* put Judge Wright on notice of the conflict between the state and federal courts' scheduling orders. In viewing Perroni's failure to address his conflict problem with both the federal and state judges when he had more than five months to do so, Judge Fox's holding that Perroni's disobedience of the scheduling order constituted contempt because Perroni's actions (or inactions) clearly interfered with the trial court's business or proceedings and reflected upon the court's integrity.

As discussed above, Perroni raised six subpoints whereby he attempts to question Judge Fox's bias and attacks Judge Fox's refusal to recuse. However, none of these points adversely affect the facts and Perroni's concessions, which we have already held support Judge Fox's finding of contempt. Consequently, these points become superfluous matters, and we need not address them further. Based on these facts, Judge Fox was justified in issuing a show-cause order and finding Perroni in contempt for willfully failing to comply with the state court's scheduling order.

Before leaving Perroni's recusal and contempt issues, we consider Perroni's additional argument that the Supremacy Clause of the United States Constitution required him to obey the federal court scheduling order, rather than the state court's order. The Supremacy Clause, found in Article 6 of the Constitution, provides that:

> [t]his Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

As the State points out, this is a challenge to the validity of the circuit court's order, and as such, it cannot be considered in this appeal. *See Carle v. Burnett*, 311 Ark. 477, 845 S.W.2d 7 (1993) (court will not go behind the order to determine its validity). Moreover, the argument is meritless. Perroni cites nothing that would support his apparent assertion that a federal court's trial date is tantamount to a "law[ ] of the United States," such that it would utterly nullify a state court's order. A Pennsylvania court rejected an identical argument in a factually identical case as "frivolous and lacking merit." *See Swoyer v. Commonwealth Department of Transportation*, 599 A.2d 710 (Pa. Commonw. Ct. 1991). We agree with the *Swoyer* court.

Finally, we turn to Perroni's third point for reversal, wherein he contends that the trial court failed to accord him his constitutional protections. Perroni first argues that the trial court erred when it denied his motion for jury trial on the contempt charge, and violated the provisions of *Brady v. Maryland*, 373 U.S. 83 (1963), when it denied his motion for exculpatory evidence.

In support of his argument that Judge Fox denied him his constitutional right to a jury trial, Perroni cites *Etoch v. State*, 343 Ark. 361, 37 S.W.3d 186 (2001). However, *Etoch* actually undermines Perroni's argument. There, Louis Etoch was charged with criminal contempt, tried without a jury, and sentenced by the trial judge to only a few days in prison. In reversing, this court noted that criminal penalties may not be imposed on an alleged contemnor who has not been afforded the protections that the Constitution requires of criminal proceedings. *Id.* at 365 (citing *Fitzhugh v. State*, 296 Ark. 137, 752 S.W.2d 275 (1988)).

However, petty contempt, like other petty criminal offenses, may be tried without a jury. *Id.* (citing *Taylor v. Hayes*, 18 U.S. 488 (1974)). Contempt of court is a petty offense when the penalty actually imposed does not exceed six months or a longer penalty has not been expressly authorized by statute. *Id.* In cases of criminal contempt, this court wrote, the better practice is for the trial judge to announce at the outset whether punishment in excess of six months may be imposed. If the judge does not contemplate the imposition of a greater sentence, *a jury is not necessary*; otherwise, one may be demanded." *Id.* (emphasis added).

Here, at the outset of the March 5, 2003, hearing, Judge Fox stated from the bench the following: "I am announcing that in the event of a finding of criminal contempt by the court, *the range of punishment will not exceed six months' incarceration*." (Emphasis added.) Therefore, under the explicit holding of *Etoch*, Perroni was not entitled to a jury trial, and the trial court did not err in denying his request for one. To note the obvious, Judge Fox never imposed *any* incarceration in this contempt matter.

Next, Perroni contends that the judge erred in denying his motion for exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83 (1963), of course, held that "the

suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *See also Cloirdv. State*, 349 Ark. 33, 76 S.W.3d 813 (2002); Ark. R. Crim. P. 17.1(d). However, Perroni cites no case, and our research has revealed none, where the *Brady* requirements have been held to be applicable in contempt proceedings; this makes sense, because there is no prosecutor, *per se*, in contempt matters. Instead, the purpose of a criminal contempt proceeding is that it is brought to preserve the power and vindicate the dignity of the court and to punish for disobedience of its order. *Fitzhugh v. State*, 296 Ark. 137, 752 S.W.2d 275 (1988).

It is true that this court has held that criminal penalties may not be imposed on an alleged contemnor who has not been afforded the protections that the Constitution requires of criminal proceedings. *See id.* at 140. However, to date, this court has only held that due process requires, in criminal contempt proceedings, that an alleged contemnor be notified that a charge of contempt is pending against him and be informed of the specific nature of that charge. *Id.; see also Ark. Dep V of Human Servs. v. R.P., supra.* Perroni cites no authority to the contrary, and because this court will not consider an argument made without convincing authority, we reject Perroni's *Brady* claim.

Furthermore, the court rejects Perroni's claim because he has made no showing that the State - to the extent it was required to be involved here - "was ever aware of or in possession of such [exculpatory] evidence." *See Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001) (*per curiam*). In *State v. Larimore*, 341 Ark. 397, 17 S.W.3d 87 (2000), citing *Strickler v. Greene*, 527 U.S. 263 (1999), we stated the test for *Brady* violations as follows:

> The Court, in *Strickler*, . . . outlined three elements of a true *Brady* violation. These components include: (1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either wilfully or inadvertently; and (3) prejudice must have ensued.

In *Lee v. State*, 340 Ark. 504, 11 S.W.3d 553 (2000), we noted that prejudice can be demonstrated when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. However, key among these factors is that *prejudice must be demonstrated.*

Here, Perroni does not even argue that he was prejudiced; instead, he baldly asserts that Judge Fox "committed reversible error by failing to accord Perroni his constitutional protections provided under Brady and its progeny." We have repeatedly held that we will not reverse in the absence of a demonstration of prejudice. *See Stivers v. State*, ____ Ark. _____, 118 S.W.3d 558 (2003); *Ridling v. State*, 348 Ark. 213, 72 S.W.3d 466 (2002); *Ramaker v. State*, 345 Ark. 225, 46 S.W.3d 519 (2001). Therefore, because Perroni has not demonstrated prejudice, this court affirms on this issue.

For the reasons stated above, we affirm.

BROWN, IMBER, and THORNTON, JJ., dissent.

SUPREME COURT OF ARKANSAS
No. 03-878

SAMUEL A. PERRONI,
APPELLANT,

VS.

STATE OF ARKANSAS,
APPELLEE,

Opinion Delivered June 17, 2004

[ENTERED: JUNE 17, 2004]

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, NO. CR 00-2498, HON. TIMOTHY DAVIS FOX, JUDGE,

DISSENT.

RAY THORNTON, Associate Justice

I respectfully dissent because I believe that Judge Fox should have recused from the contempt proceedings against Mr. Perroni and that Mr. Perroni should be given the opportunity for a trial before an impartial tribunal.

I. Facts

Because the majority opinion does not fully recite all the circumstances relating to Mr. Perroni's points on appeal, a more detailed statement will be given.

On July 1, 2000, a felony information was filed by the State against Richard Ross, Mr. Perroni's client, and two other defendants. Mr. Ross faced felony tax-fraud charges. On August 5, 2002, Mr. Perroni executed an

acknowledgment of a scheduling order, which stated that Mr. Ross's four-day jury trial was scheduled for 9:00 a.m. on February 11, 2003. Judge David Bogard presided at the time. During Judge Bogard's tenure on the bench, the practice was for the prosecutors to select on jury trial days which cases should be tried first. Capital felonies and child-abuse cases were given top priority.

Mr. Perroni also represented a client, Steven Pirani, in federal court. Mr. Pirani and two co-defendants were charged with numerous felony offenses. On August 9, 2002, Mr. Perroni filed a motion for continuance on behalf of Mr. Pirani, in federal court with United States District Judge Susan Webber Wright. The federal district court entered an order granting a continuance in the *Pirani* case on September 4, 2002, and a jury trial for Mr. Pirani and his two co-defendants was scheduled for 9:30 a.m. on February 10, 2003. Mr. Perroni stated that he thought the cases would be severed and that the two co-defendants would be tried first. Judge Wright entered two orders, dated January 6, 2003, and January 17, 2003, respectively, in the *Pirani* case and recited that Mr. Pirani's case was scheduled for February 10, 2003.

During a telephone conference on January 31, 2003, Mr. Perroni learned that the federal court had decided to try Mr. Pirani's case first ahead of his two co-defendants. When Mr. Perroni learned that Mr. Pirani's case was going to be tried first, he filed a motion for continuance in the *Ross* case with Judge Tim Fox, the newly-elected judge who replaced Judge Bogard.

On February 4, 2003, the federal district court entered an order, stating that there would be two separate trials of the *Pirani* defendants with Mr. Pirani's trial set to begin on February 10, 2003.

On that same day, February 4, 2003, a hearing was held before Judge Fox on Mr. Perroni's motion for continuance in the *Ross* case. Mr. Matthew House, an associate of Mr. Perroni's law firm, appeared before Judge Fox on behalf of Mr. Ross. Judge Fox denied the motion for continuance. That afternoon, Mr. Perroni appeared and made an oral request that the order denying his motion for continuance be reconsidered.

On February 5, 2003, Mr. Perroni appeared at the hearing on his motion for reconsideration. At the hearing, Mr. Perroni told Judge Fox that there was a conflict in federal court because of his *Pirani* case on February 10, 2003, and Mr. Perroni offered to file a continuance with the federal court. The following colloquy occurred:

> MR. PERRONI: But I didn't have a conflict with being over there [in federal court] on the 10th. I can file a motion—if you want, I'll file a motion for continuance with Judge Wright.
>
> THE COURT: NO. I'm just-and it's been the practice of this court, under the previous judge, that because they had to manage their own dockets, that the prosecutors got to select on jury trial days which ones they felt they were out of time with or which ones were going to go, and that may have been what happened obviously on the capital felony murder thing.
>
> MR. PERRONI: Right.
>
> THE COURT: That's not necessarily going to be the case from now on because, for instance, I'm telling you that Mr. Ross has to go to trial. I'll also be telling them that I don't care what else is set for that day, this is first out for that day. And that nobody else, no matter what it is, is bumping anything for those three days. This one is going to go to trial.

At that time, Mr. Perroni represented to Judge Fox that the federal district court's decision to decide Mr. Pirani's case before his two co-defendants' was made on January 31, 2003, a few days before the February 5 hearing. Mr. Perroni then made an oral motionto withdraw because he could not try two cases at once. That motion was taken under advisement pending Mr. Ross's ability to find substitute counsel. On February 7, 2003, Judge Fox sent a letter denying Mr. Perroni's motion to be relieved as counsel without prejudice.

On February 10, 2003, Mr. Perroni attached a copy of Judge Wright's scheduling order, which reflected the February 10, 2003, trial, date in the *Pirani* case to his renewed motion for continuance and renewed motion to withdraw as counsel in the Ross case.

The *Ross* case was called for trial in state court on February 11, 2003. Mr. Perroni, who was representing his client in federal court, did not appear with Mr. Ross, but Mr. Patrick James, Mr. Perroni's law partner, appeared on Mr. Ross's behalf. Because Mr. Ross had not found substitute counsel, Mr. Ross's trial had to be rescheduled. Judge Fox denied Mr. Perroni's motion for continuance and motion to withdraw made by Mr. James. Citing Ark. Code Ann. § 16-84-1-111(b) (Supp. 2003), Judge Fox ruled that Mr. Ross was to be taken into custody.

On the afternoon of February 11, 2003, Mr. James appeared before Judge Fox and moved to dismiss the charges against Mr. Ross and requested that he be released from jail. At the hearing, Mr. James argued three points: (1) that Judge Fox should disclose all *ex parte* communication involving a letter sent by Judge Fox, (2) that Judge Fox should recuse on the basis of bias, and (3) that Judge Fox held Mr. Ross in custody in an attempt to punish Mr.

Perroni for failing to appear with Mr. Ross that morning. Judge Fox denied Mr. Ross's release and refused to set a hearing on the matter for the following day.

On February 12, 2003, Judge Fox issued an order to show cause for Mr. Perroni's failure to appear at Mr. Ross's February 11 trial. Judge Fox then decided to release Mr. Ross from jail on two conditions: (1) that the bond remain in effect and (2) that Mr. Ross find substitute counsel within two weeks for a July 29, 2003, jury trial. Judge Fox's decision to release Mr. Ross was based upon information obtained by Judge Fox's staff, who called the bonding company to inquire about Mr. Ross's bond. Judge Fox's staff called the bonding company again on the morning of February 12, 2003, and the bonding company, who had been contacted by Mr. James the previous evening, replied that "they would remain on [Mr. Ross's] bond pending the next trial setting."

On February 18, 2003, Mr. Perroni filed a motion requesting Judge Fox's recusal. In his motion, Mr. Perroni further alleged that Judge Fox violated the Code ofjudicial Conduct when he investigated Mr. Ross's bond. Judge Fox denied the motion.

On March 5, 2003, Judge Fox conducted a hearing on numerous motions filed by Mr. Perroni. Among the motions filed by Mr. Perroni were motions on recusal, impartiality, jury trial, and *ex parte* communications. Judge Fox denied all four motions.

Subsequently, on March 10, 2003, Judge Fox directed his law clerk, Mr. David Eanes, to go to the United States District Court Clerk's office for the purpose of obtaining copies of pleadings and scheduling orders in Mr. Perroni's federal case. Judge Fox gave Mr. Eanes $20.00 cash of his own money to make copies of these documents. Mr. Eanes complied with Judge Fox's order, went to the federal

courthouse, perused the federal file, chose various orders, and made the copies. Because the cost was a total of $35.20, and Judge Fox had given Mr. Eanes $20.00 in cash, Mr. Eanes wrote a check from his personal banking account for the difference of $35.20. Mr. Eanes returned to the county courthouse where he told Judge Fox that the pleadings cost more than $20.00. Mr. Eanes gave the orders and receipts to Judge Fox, and Judge Fox reimbursed Mr. Eanes by giving him $35.20 from his own pocket. Nothing in the record reflects that reimbursement vouchers for this expense were ever filed with Pulaski County.

On March 13, 2003, Mr. Perroni filed a notice of removal of the *Ross* case to federal court.

On March 14, 2003, the evidentiary portion of Mr. Perroni's contempt hearing was held. Mr. Tim Dudley represented Mr. Perroni, and renewed Mr. Perroni's motion that Judge Fox recuse based upon the allegation that Judge Fox was prosecuting the case and was presiding as a judge.

Mr. Dudley also objected to the relevancy of the admission of the federal pleadings in the *Pirani* case. Specifically, he argued that Judge Fox and his law clerk, Mr. Eanes, conducted an *ex parte* investigation by going to federal court to retrieve the federal pleadings in the *Pirani* case. Judge Fox denied the motion for recusal and overruled the objections regarding the federal pleadings. Judge Fox proceeded with the evidentiary portion of the hearing during which Judge Bill Wilson, a federal district judge, testified as a character witness for Mr. Perroni. Judge Fox withheld any decision pending the federal court's decision on the notice of removal.

The federal district court remanded the *Ross* case to state court on May 6, 2003.

On May 9, 2003, Mr. Perroni filed a supplement to his motion to recuse, alleging five points: (1) that Judge Fox's independent investigation was in violation of the Code of judicial Conduct, (2) that recusal is mandatory as the trial court developed personal knowledge of disputed evidentiary facts concerning the proceedings, (3) that the court exhibited actual bias by serving as the prosecutor and introducing evidence against Mr. Perroni, (4) that the trial court demonstrated actual bias and a conflict of interest by providing testimony against Mr. Perroni, and (5) that Judge Fox must recuse as a party opponent in pending litigation with Mr. Perroni and his law firm concerning the Freedom of Information Act.

Mr. Perroni's final contempt hearing was held on May 12, 2003. Judge Fox presided over this hearing and denied the motion. Judge Fox found Mr. Perroni guilty of contempt of court.

On May 14, 2003, Judge Fox entered an order finding Mr. Perroni in contempt and ordered him pay $780.00 as reimbursement for jurors' fees; $443.72 to reimburse the prosecutor's office for various witness fees; $55.20 to reimburse Pulaski County for the expense of copying and certifying federal court *Pirani* pleadings, and a $1,000.00 fine.[1]

Mr. Perroni timely filed his notice of appeal on May 15, 2003. On May 16, 2003, a hearing was held on a companion *Perroni* case involving requests made under the Freedom of Information Act, and the trial court ruled that Mr. Eanes's personal check was a public record under the Freedom of Information Act.

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[1] As noted above, Judge Fox had not sought reimbursement for his personal expenses in securing the evidence at the time he ordered Mr. Perroni to reimburse Pulaski County for these expenses.

On May 22, 2003, approximately one week after the contempt order was entered, Judge Fox recused from the *Ross* case.

On appeal, Mr. Perroni makes three allegations of error. First, he argues that Judge Fox erred by failing to recuse. Second, he contends that there was insufficient evidence to find him in "willful" contempt. Third, he argues that Judge Fox committed reversible error by failing to guarantee a jury trial in the contempt proceeding.

II. Scheduling conflict

In addressing Mr. Perroni's points on appeal, I cannot agree with the majority's analysis. The majority considers the threshold issue as a question whether Mr. Perroni disobeyed Judge Fox's scheduling order. Here, there is no doubt that Mr. Perroni did not appear for Mr. Ross's February 11, 2003, trial. That fact does not appear to be in dispute, and Mr. Perroni's non-appearance goes to the heart of his second point on appeal involving his alleged contempt.

However, the troubling facts surrounding Mr. Perroni's non-appearance give rise to his first point on appeal: whether Judge Fox should have recused. The majority views this point on appeal as "superfluous" and fails to address it. I view the recusal issue as the threshold issue in the case because if this court concludes that Judge Fox should have recused, then he should not have presided over Mr. Perroni's contempt hearing.

III. Recusal

For his first point on appeal, Mr. Perroni argues that Judge Fox committed reversible-error by failing to recuse. Specifically, he makes the following arguments: (1) Judge Fox committed reversible error in serving as a prosecutor;

(2) Judge Fox committed reversible error in serving as a witness; (3) Judge Fox committed reversible error in prejudging the case; (4) Judge Fox's improper incarceration of Ross demonstrated animus and retaliation; (5) Judge Fox's independent ex parte investigations of the facts of the case mandated his recusal, and (6) there was an appearance of impropriety mandating Judge Fox's recusal.

The majority calls these sub-issues "superfluous," but I find them compelling and, ultimately, dispositive of Mr. Perroni's first point on appeal. For the purpose of this dissent, I will focus primarily on the allegations involving Mr. Ross's incarceration as demonstrating retaliation against Mr. Perroni and the issue involving the *ex parte* investigation as the basis for Judge Fox's recusal.

This court recently articulated our standard of review for recusal in *Manila School Dist. No. 15 v. Wagner*, _____ Ark. _____, _____ S.W.3d _____ (2004), where we stated:

> A trial judge has a duty not to recuse from a case where no prejudice exists. Thus, if there is no valid reason for the judge to disqualify himself or herself, he or she has a duty to remain on a case. There is a presumption that judges are impartial. The person seeking disqualification bears the burden of proving otherwise. The trial judge's decision not to recuse from a case is a discretionary one and will not be reversed on appeal absent an abuse of that discretion. An abuse of discretion can be shown by proving bias or prejudice on the part of the trial judge. To decide whether there has been an abuse of discretion, this court reviews the record to determine if prejudice or bias was exhibited. It is the appellant's burden to demonstrate such bias or prejudice.

Id. (citation omitted).

Further, judges must refrain from presiding over cases in which they might be interested and must avoid all appearance of bias. *Arkansas Dept. of Human Services v. R.P.*, 333 Ark. 516, 538, 970 S.W.2d 225, 236 (1998). To decide whether there was an abuse of discretion, we review the record to determine if any prejudice or bias was exhibited. *Id.* The question of bias is usually confined to the conscience of the judge. *Id.* Judges are presumed to be impartial, and the party seeking disqualification has the burden of showing otherwise. *Id.*

This court made it abundantly clear in *Clark v. State*, 287 Ark. 221, 697 S.W.2d 895 (1985), that when remarks indicate that the judge is "embroiled in a personal dispute," then the judge should recuse from the case. *Id.*

The Eighth Circuit cited *Clark, supra,* with approval in *Smith v. Lockhart*, 923 F.2d 1314, 1322 (8th Cir. 1991), where it stated:

> In *Johnson v. Mississippi*, 403 U.S. 212, 91 S. Ct. 1778, 29 L.Ed.2d 423 (1971) (*per curiam*), a defendant was cited for contempt during his trial. *Id.* at 213, 91 S. Ct. at 1779. Johnson moved the judge to recuse himself from presiding over the contempt proceeding because of bias. Johnson then filed a federal civil rights lawsuit naming the judge as a defendant. Johnson again asked the judge to remove himself, which the judge refused to do. The judge found Johnson guilty of contempt and sentenced him to jail. *Id.* at 213-14, 91 S. Ct. at 1779-80. The Court held that the judge should have recused himself because the federal lawsuit naming him as a defendant made it impossible for him to be unbiased toward Johnson. *Id.* at 215-16, 91 S. Ct. at 1780-81. The D.C. Circuit has explained the import of *Johnson*:

> Thus, the trial judge, by virtue of his status as a defendant in a suit brought by the alleged contemnor, was in an adversary posture with respect to him, and was presumptively biased. *This is true even though the judge's status as an adversary party was created by an action of the alleged contemnor filing suit....*

United States v. Meyer, 462 F.2d 827, 842 (D.C. Cir. 1972) (emphasis added).

> In general, judges should recuse themselves when they have become enmeshed in personal disputes with parties before them. *See, e.g., id.* at 836; *Clark v. State*, 287 Ark. 221, 697 S.W.2d 895, 897 (1985). The Supreme Court has explained that "when the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from view, and we must presume the process was impaired." *Vasquez v. Hillery*, 474 U.S. 254, 263, 106 S. Ct. 617, 623, 88 L. Ed. 2d 598 (1986) (dicta) (citing *Tumey v. Ohio*, 273 U.S. 510, 535, 47 S. Ct. 437, 445, 71 L. Ed. 749 (1927)); *see also Bolden v. State*, 262 Ark. 718, 720, 561 S.W.2d 281, 283 (1978); Code of Judicial Conduct, Canon 3(C) (1972) (judges should disqualify themselves when their impartiality "might reasonably be questioned").

Smith, supra.

Based upon this well-established precedent regarding the recusal of judges, I would hold that Judge Fox should have recused in this case on the basis that he held Mr. Perroni's client, Mr. Ross, in jail out of what Mr. Perroni calls "animus and retaliation" and that he conducted an *ex parte* investigation at his own expense to obtain evidence that he admitted against Mr. Perroni in his contempt proceeding. The actions of Judge Fox were the subject of

litigation in which both Judge Fox and Mr. Perroni were adversaries. It is troubling to me that Judge Fox later recused on May 22, 2003, from the *Ross* case after declining to recuse from the contempt proceedings against Mr. Perroni. In my view, Judge Fox should have recused at an earlier date.

A. Holding Mr. Ross in custody

From the record before us, it appears to me that Judge Fox gave the appearance of retaliation toward Mr. Perroni through his client, Mr. Ross, when Judge Fox took Mr. Ross into custody.

On the afternoon of Wednesday, February 11, 2003, Mr. Perroni's law partner, Mr. James, appeared before Judge Fox to secure Mr. Ross's release from custody and to request that the charges against Mr. Ross be dismissed. The following colloquy occurred:

> THE COURT: Have you had a chance to visit with your client [Ross] about whether he's intending to keep present counsel or find substitute counsel?
>
> MR. JAMES: I have not, Judge.
>
> THE COURT: All right.
>
> MR. JAMES: Right now, I'm just-and let me say this, Judge, we're here for a bond.
>
> THE COURT: No. We're not here for a bond.
>
> MR. JAMES: Well, -

THE COURT: He is in the custody of the court at the present time.

MR. JAMES: Respectfully, I'd submit it is this court's obligation to post a bond for this man. And then the issues are: Will he appear at the hearing? Is there basis to hold him?

As I read your order-and whether I agree or disagree with it, it's irrelevant. But the fault or the blame, to a large extent, was cast upon counsel, not upon this man who has been here for these hearings and who has not shown any indication of not being at trial.

And I would submit that he is being unfairly punished for this, whether intentionally or unintentionally, and he should not bear the brunt.

* * *

THE COURT: Mr. James, I wasn't inquiring about when federal court starts because I wanted Mr. Perroni to come over here at this point in time and try another full couple of days. . . . I was simply inquiring as to whether there was going to be some time on my docket, either before or after the federal court started, in the next day or so that Mr. Perroni could come over here so we could find out when we can have a trial date and so that I can make a final decision as to what I'm going to do.

And I think you need to be careful abou saying that you want to characterize this as is a demand for a bond hearing, because a bond hearing, each side needs to have plenty of time to get whatever witnesses here that they want for the bond

hearing to have a correct bond hearing.

MR. JAMES: Let's put it this way, we're asking that Mr. Ross be released, period.

THE COURT: Then that's not the same as a bond hearing, I don't believe, Mr. James.

MR. JAMES: Well, Judge, I mean, in effect, I respectfully disagree.

* * *

MR. JAMES: Well, Judge, we'd ask that Mr. Ross be released immediately.

THE COURT: That's denied.

MR. JAMES: Can I have the reasons in the record, please, sir?

THE COURT: I have gone over all your motions, and I have ruled on them, Mr. James.

MR. JAMES: But I don't understand, Judge, the—

THE COURT: Are you requesting a bond hearing?

MR. JAMES: Judge, I'm asking that he be released on bond immediately; and that if he is not released, that the reasons be stated for the record.

THE COURT: Okay. I'm not going any further with going over anything, Mr. James. And if I had counsel for the defendant here for even maybe fifteen minutes so that we could look at scheduling a trial date to continue this matter and get it resolved, then perhaps we could get into that. We don't have that.

MR. JAMES: Judge, I don't understand the urgency for this today when there's one trial ongoing and this one is not. So, again, I'm going to ask that you state the reasons that this man is being held without bond and is not being released.

THE COURT: All right. Let's set a bond hearing date.

* * *

THE CASE COORDINATOR: We could do it either tomorrow or Friday.

THE COURT: Well, do we have jury trials tomorrow or Thursday?

THE CASE COORDINATOR: No. We do not have a jury trial tomorrow. We have reports only. We could do it as –

THE COURT: Let's do it Friday morning.

THE CASE COORDINATOR: Okay.

MR. JAMES: Judge, we would ask that it be tomorrow morning. This was part of the date that the court had set for this trial. This man is being held without bond during that time period, so we would respectfully not only request that it be held first

thing tomorrow, but this court also take judicial notice of the previous proceedings in which Mr. Ross was released on bail.

As I hear the State, they're saying they don't have any witnesses. Bond has been in place. There have been no facts with regard to this man sitting here which would justify any type of revocation. There has been no evidence of any type of change of circumstances.

And, in the meantime, he's being held without bond, and we respectfully submit, Judge, that's unconstitutional. That's contrary to both—

THE COURT: You've made that—Mr. James, you've made that argument, and I believe that that's clear for the record that you've made that argument. Now can I have a bond hearing Friday morning?

MR. JAMES: Can the court state on the record why we're not having a hearing tomorrow?

THE COURT: I'm not going to go over that again. Can I have a bond hearing for Friday morning, please?

THE CASE COORDINATOR: February 14, 9:30.

THE COURT: Now, Mr. James, if I can have the person [Mr. Perroni] that's going to try the defense of this case for the defendant here for even a very short period of time, any time between now and then that we can arrange to get Mr. Ross here, then I can think about moving this case forward and think about resolving the other problems with this case; but you're not the person that can do that.

MR. JAMES: So you're going to hold him hostage till you get that?

THE COURT: No, that's not it.

MR. JAMES: Without bond, contrary to the Arkansas Constitution.

THE COURT: Mr. James, -

MR. JAMES: We renew our motion to recuse, Judge, on the basis of those comments.

THE COURT: Okay. Okay.

MR. JAMES: Will you please rule on that?

THE COURT: That will be denied.

MR. JAMES: Thank you.

The adversarial tone of this colloquy is evidence of Judge Fox's retaliation against Mr. Perroni by punishing his client, Mr. Ross, for Mr. Perroni's failure to appear as scheduled and by refusing to release Mr. Ross on the bond he had already made, or to set Mr. Ross's bond hearing immediately or for the following day on Thursday, February 12, 2003. Mr. James represented to the court that Mr. Ross's existing bond was still "in place" and that he should be released. Mr. Ross did not appear to be a "danger" under Ark. R. Crim. P. 9. However, Judge Fox refused to set a bond hearing and ruled that Mr. Ross, who had already made bond and who had previously been released, should be incarcerated for two days until a bond hearing would be held on Friday, February 14, 2003.

It appears that Judge Fox had a change of heart after holding Mr. Ross without bond for one night, as he held a bond hearing for Mr. Ross the next morning on Thursday, February 13, 2003, during which time he revealed that he had instructed his staff to call the bonding company to inquire whether "they'll stay on the bond." After the hearing, Judge Fox ruled from the bench that he would release Mr. Ross on the condition that the bond remained and that Mr. Ross takes two weeks to find an attorney for his newly-scheduled July 29 jury trial.

Article 2, § 8, of the Arkansas Constitution provides that "All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when proof is evident or the presumption great." A criminal defendant has an absolute right before conviction," except in capital cases, to a reasonable bail. *Reeves v. State*, 261 Ark. 384, 548 S.W.2d 822 (1977). *See also Duncan v. State*, 308 Ark. 205, 823 S.W.2d 886 (1992).

Based upon this precedent, Judge Fox should have released Mr. Ross on bail. There is an appearance that Judge Fox retaliated against Mr. Perroni by refusing to release Mr. Ross on the bond he had already secured and by keeping him in jail overnight. By rescheduling the bond hearing for early Thursday morning, particularly after being so adamant about having it scheduled for Friday morning, Judge Fox gave the appearance of trying to un-do a hasty decision made out of retaliation against Mr. Perroni. Based upon precedent involving the recusal of judges, as well as our standard of review, I would hold that Judge Fox should have recused at the time that Mr. Ross's incarceration was considered.

B. Ex parte investigation

In my view, Judge Fox should also have recused because he conducted an *ex parte* investigation in violation of Canon 3(b)(7) of the Arkansas Code of judicial Conduct.

In contempt cases, a judge sits as a fact-finder. *See Ivy v. Keith*, 351 Ark. 269, 92 S.W.3d 671 (2002). However, the role of a judge as a fact-finder does not include conducting an independent investigation of the case before him. The Commentaries to Canon 3(B)(7) provide:

> Certain *ex parte* communication is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage *ex parte* communication and allow it only if all the criteria stated in Section 3B(7) are clearly met. A judge must disclose to all parties all *ex parte* communications described in Sections 3B(7)(a) and 3(B)(7)(b) regarding a proceeding pending or impending before the judge.
>
> *A judge must not independently investigate facts in a case and must consider only the evidence presented.*

Id. (emphasis added) *See also Horton v. Ferrell*, 335 Ark. 366, 981 S.W.2d 88 (1998) (holding that a special master, who is subject to the Code of Judicial Conduct, obtained evidence in an *ex parte* investigation).

Here, Judge Fox conducted an independent investigation when he instructed Mr. Eanes to go to the federal courthouse to review and to copy the *Pirani* pleadings that he later introduced against Mr. Perroni in the contempt hearing. The copies of these pleadings were paid for by cash out of the judge's pocket and by a check from

Mr. Eanes's personal checking account. It appears that Judge Fox conducted this *ex parte* investigation of the federal proceedings to determine the veracity of Mr. Perroni's statements about a conflict between the *Pirani* case and the *Ross* case. These actions constitute a clear violation of Canon 3(B)(7) and display a bias that requires recusal from the case.

In contempt proceedings, a judge determines the credibility of witnesses. *See Ivy, supra.* However, a judge's actions should not go beyond the boundaries established in Canon 3B(7). The sitting judge "must consider only the evidence presented." *See* Commentaries to Canon 3(B)(7). Here, Judge Fox already had the evidence of the federal scheduling order before him. As the majority points out, "On February 10, 2003, Perroni had a letter delivered to Judge Fox, renewing his motions for continuance and to withdraw as counsel. He enclosed a copy of Judge Wright's scheduling order which reflected that Steve Pirani's trial was to begin on February 10, 2003." If additional evidence was required, Judge Fox could have appropriately ordered Mr. Perroni or the State to provide a copy of the federal docket, as well as any copies of the *Pirani* federal pleadings, to him prior to the contempt hearing. However, Judge Fox directed his employee, Mr. Eanes, to assist in his personal investigation of the facts, and the material obtained through this *ex parte* investigation was then introduced by Judge Fox as evidence for his own consideration during Mr. Perroni's contempt proceedings over which Judge Fox presided.

Based upon these actions, it appears that Judge Fox became "embroiled in a personal dispute" when he conducted an independent *ex parte* investigation. *Clark, supra.* Therefore, based upon our well-established case law regarding a judge's recusal, as well as our Canons in the Code of judicial Conduct, I believe that Judge Fox abused his discretion in refusing to recuse at that time.

IV. Contempt

For his second point on appeal, Mr. Perroni argues that, as a matter of law, there is insufficient evidence to find him in "willful contempt" under Ark. Code Ann. § 16-10-108(a)(3) (Repl. 1999).

The purpose of criminal contempt is to preserve power, vindicate the dignity of the court, and punish for disobedience of the court's order. *Fitzhugh v. State*, 296 Ark. 137, 752 S.W.2d 275 (1988). Pursuant to Ark. Code Ann. § 16-10-108(a)(3), a court has the power to punish, as for criminal attempt, a person for "[w]illful disobedience of any process or order lawfully issued or made by it." *Id.* However, a judge's power to punish for criminal contempt is not limited by §16-10-108, as such power is inherent in the courts and goes beyond the power given to judges by statute. *Fitzhugh, supra.*

A criminal contempt citation must be based on evidence beyond a reasonable doubt. *Witherspoon v. State*, 322 Ark. 376, 909 S.W.2d 314 (1995). That determination should be made by the judge selected to hear the contempt charges following Judge Fox's recusal. Only then can an appellate court review a decision unaffected by the appearance of bias. I note that while Mr. Perroni might have rearranged his federal and state trial schedules at an earlier date, his assertion that he did not recognize an actual conflict between the federal *Pirani* case, which was scheduled for February 10, 2003, and the state *Ross* case, which was scheduled for February 11, 2003, until the telephone conference on January 31, 2003, is a question of credibility and should be considered by a trial judge who is not embroiled in a personal dispute with the defendant. Mr. Perroni contended that it "was just decided by Judge Wright just a few days ago [January 31, 2003]" that Mr. Pirani's federal case was to be tried before his co-defendants' cases.

When Mr. Perroni asked if he should file a continuance with Judge Wright in federal court, Judge Fox responded, "No." Under *Fitzhugh, supra,* there is an unresolved issue whether the circumstances of this case would support a finding of sufficient evidence of willful contempt under the statute. Therefore, I would reverse and remand in order that Judge Fox recuse and that a replacement judge be appointed to conduct the hearing.

Because I would hold that the case should be remanded for an impartial tribunal to preside over the contempt proceedings, there is no need to address Mr. Perroni's third point on appeal involving his right to a jury trial.

V. Conclusion

An analysis of these issues is not given in the majority opinion. Based upon our standard of review regarding the recusal of judges, as well as Canon 3(B)(7), I would hold that Judge Fox did not avoid all appearances of bias when he conducted an independent *ex parte* investigation to obtain evidence, namely the scheduling order, that had already been presented to him. Because I would hold that Judge Fox should have recused, I would reverse and remand for another judge to preside over the contempt proceedings against Mr. Perroni. Therefore, I would reverse and remand.

SUPREME COURT OF ARKANSAS
No. 03-878

SAMUEL A. PERRONI,
APPELLANT

VS.

STATE OF ARKANSAS,
APPELLEE

Opinion Delivered June 17, 2004

[ENTERED: JUNE 17, 2004]

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, NO. CR 00-2498, HON. TIMOTHY DAVIS FOX, JUDGE

DISSENTING.

ANNABELLE CLINTON IMBER, Associate Justice

While I agree that there is sufficient evidence to support a finding of contempt in this case, the majority has sidestepped the more critical issue in failing to address Mr. Perroni's arguments in regard to recusal. Under the facts and circumstances of this case, I believe that Judge Fox should have recused. Therefore, I must respectfully dissent.

The majority gives short shrift to Mr. Perroni's recusal argument. While the allegations contained in Mr. Perroni's motion for recusal are recited, the majority opinion is bereft of the facts and circumstances underlying the motion. Instead, after reciting our well-settled principles of law on recusal, the majority quickly disposes of Mr. Perroni's argument stating, "the primary issue is whether [Mr. Perroni] disobeyed Judge Fox's scheduling order." Of

vital importance is the majority's failure to address Judge Fox's independent investigation in the contempt proceeding he initiated against Mr. Perroni.

In order to understand the context of the argument on appeal, a more detailed statement of the facts is necessary. On February 11, 2003, Mr. Perroni failed to appear and represent his client, Richard Ross, in a criminal trial due to a conflict he had in representing another defendant, Steven Pirani, in federal court. Mr. Ross made an appearance and Mr. Perroni's law partner, Patrick James, made a special appearance on Ross's behalf. The State prosecutor reported ready to proceed, but the court continued the case because the defendant did not have representation by counsel. On that same day, Mr. James requested that Judge Fox recuse from the Ross case.

The following day, February 12, 2003, while conducting a bond hearing in the *Ross* case, Judge Fox entered an order directing Mr. Perroni to show cause why he should not be held in contempt of court for his failure to appear with his client, Mr. Ross, at the February 11 criminal trial. The court scheduled a show-cause hearing for March 14, 2003. On February 18, 2003, Mr. Perroni filed a motion suggesting that Judge Fox recuse from the contempt proceeding. The judge denied this motion. During a hearing conducted by Judge Fox on March 5, 2003, Mr. Perroni again asked Judge Fox to recuse from the contempt proceeding. This oral request was also denied.

Then, on March 10, 2003, Judge Fox directed his law clerk to purchase certified copies of pleadings and orders filed in the federal *Pirani* case. The judge gave the law clerk cash from his own personal funds to pay for the

documents.[1] On March 14, 2003, Judge Fox conducted the show-cause hearing. Mr. Perroni again requested that Judge Fox recuse from the contempt proceeding, and the judge once again denied the motion. At the hearing, over Mr. Perroni's objection, Judge Fox introduced the certified federal documents obtained by his law clerk as evidence in the contempt proceeding. On May 9, 2003, Mr. Perroni filed a fourth and final motion requesting that Judge Fox recuse, which motion was again denied by the judge. On May 14, 2003, Judge Fox entered the order finding Mr. Perroni in willful contempt and ordered him to pay $780.00 as reimbursement for jurors' fees; $443.72 to reimburse the prosecutor's office for various witness fees; $55.20 to reimburse Pulaski County for the expense of copying and certifying federal court *Pirani* pleadings, and a $1,000 fine.

This court's general standard of review for cases involving recusal is well settled. The decision to recuse is within the trial court's discretion, and it will not be reversed absent abuse. *Anderson v. State*, No. Cr02-190, slip op. (April 29, 2004). An abuse of discretion can be proved by a showing of bias or prejudice on the part of the trial court, and the burden is on the party seeking to disqualify. *Id.* To decide whether there has been an abuse of discretion, we review the record to see if prejudice or bias was exhibited. *Id.* A trial judge's development of opinions, biases, or prejudices during a trial do not make the trial judge so biased as to require that he or she recuse from further

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[1] Initially, the judge gave his law clerk cash in the amount of $20. The cost of the certified documents, however, totaled $55.20, whereupon the law clerk wrote a personal check for the difference. Judge Fox subsequently reimbursed his law clerk the sum of $35.20 out of his own pocket. Nothing in the record reflects that the judge requested reimbursement from Pulaski County for the cost of the certified documents.

proceedings in the case. *Id.* Absent some objective demonstration by the appellant of the trial judge's prejudice, it is the communication of bias by the trial judge which will cause us to reverse his or her refusal to recuse. *Id.* The mere fact of adverse rulings is not enough to demonstrate bias. *Id.* Whether a judge has become-biased to the point that he should disqualify himself is a matter to be confined to the conscience of the judge. *Id.* The reason is that bias is a subjective matter peculiarly within the knowledge of the trial judge. *Id.*

We have few cases applying this standard of review to cases where a trial judge declines to recuse from a contempt hearing after issuing an order to show cause. In *Clark v. State*, 287 Ark. 221, 697 S.W.2d 895 (1985), this court concluded that a trial judge erred in not recusing from a contempt hearing. The court explained that '"a judge's impartiality can be threatened when the alleged contempt consists of a *personal attack* on the trial judge, of such a nature that the judge actually becomes embroiled in a personal dispute with the alleged contemnor, or that a 'normal' judge would likely be personally affected even though his feelings remain under control, . . ." *Id.* (citing *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971)). In *Clark*, the alleged contemnor's motion to recuse alleged criminal activity on the part of the judge, which this court considered a "personal attack" that required recusal. *Id.*

The *Clark* court relied upon a decision by the United States Supreme Court where a pro se defendant made slanderous statements against the judge during the case, and, instead of immediately holding the defendant in contempt, the court waited until the conclusion of the trial to prosecute each act of contempt. *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971). The Court held that in such a case, where no injustice would be served by recusal, due process requires a judge to recuse from the contempt hearing to

keep a fair and balanced trial. *Id.* The *Mayberry* court quoted language from a prior decision:

> Whether the trial be federal or state, the concern of due process is with the fair administration of justice. At times a judge has not been the image of 'the impersonal authority of law,' *Offutt v. United States*, 348 U.S. 11, 17, 75 S. Ct. 11, 15, 99 L.Ed. 11, but has become so 'personally embroiled' with a lawyer in the trial as to make the judge unfit to sit in judgment on the contempt charge.
>
> 'The vital point is that in sitting in judgment on such a misbehaving lawyer the judge should not himself give vent to personal spleen or respond to a personal grievance. These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice.' *Id.*, at 14, 75 S. Ct., at 13.

Mayberry v. Pennsylvania, 400 U.S. at 464.

In this case, Mr. Perroni contends that Judge Fox crossed the line of impartiality when he made an independent investigation of the facts by procuring documents in an unrelated case from a federal court. The State argues that there was not an exhibition of partiality because Judge Fox was at liberty to take judicial notice of the federal documents. This court, however, has held that Arkansas courts are forbidden from taking judicial notice of their own records, as well as records and proceedings from other courts. *See Braswell v. Gehl*, 263 Ark. 706, 567 S.W.2d 113 (1978); *see also Brissett v. Sykes*, 313 Ark. 515, 519, 855 S.W.2d 330, 333 (1993) ("Courts may not take judicial notice of prior or pending litigation in other cases, even if those cases are between the same parties."); *Smith v. State*, 307 Ark. 223, 228, 818 S.W.2d 945, 948 (1991) (holding that judicial

notice may not be taken of the record in a separate case); *Southern Farmers Association, Inc. v. Wyatt*, 234 Ark. 649, 655, 353 S.W.2d 531, 534 (1962) ("[t]he general rule is that a court will not take judicial notice of its own records or proceedings in another independent case or proceeding, unless required to do so by statute.").

Not only was Judge Fox prohibited from taking judicial notice of the federal documents, our own Code of judicial Conduct proscribes his conduct. We have held that the canons and text establish mandatory standards, not mere guidelines. *See Horton v. Ferrell*, 335 Ark. 366, 981 S.W.2d 88 (1998). The Commentary to Canon 3 of the Arkansas Code of Judicial Conduct provides: "A judge must not independently investigate facts in a case and must consider only the evidence presented." When Judge Fox sent his law clerk to the federal court to search through the *Pirani* record and bring back copies to be used in the contempt proceeding, Judge Fox inappropriately conducted an independent investigation into the facts of a case.

The majority's statements notwithstanding, we have not required a showing of actual bias in all recusal cases. We have stated that where a judge exhibits bias or the appearance of bias, we will reverse. *City of Jacksonville v. Venhaus*, 302 Ark. 204, 788 S.W.2d 478 (1990). The proper administration of the law requires not only that judges refrain from actual bias, but also that they avoid all appearance of unfairness. *Id.* In *Venhaus*, we held that a judge should have recused to avoid the mere appearance of bias. *Id.* More recently, we held that a trial judge should recuse from deciding Rule 11 sanctions where the judge's comments and rulings indicated that he was biased. *Allen v. Rutledge*, No. 03-330, slip op. (Dec. 18, 2003). We related the proceedings to a contempt charge and stated:

> [A]ll of such cases . . . present difficult questions for the judge. All we can say on the whole matter is that where conditions do not make it impracticable, or where the delay may not injure the public or private rights, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place.

Id. (quoting *Cooke v. United States*, 267 U.S. 517, 539 (1925)). Likewise, in *Horton v. Ferrell*, 335 Ark. 366, 981 S.W.2d 88 (1998), we explained that a master was required to recuse after having made an independent investigation without a showing of actual bias.

We are not presented with a case where Judge Fox's recusal would have been impracticable or where delay would have caused injury. In addition, by infusing himself into the merits of the underlying proceeding, Judge Fox made an independent investigation and became "personally embroiled" in the matter. Other jurisdictions have come to similar conclusions. *See DeSalle v. AppelBerg*, 44 Conn.App. 323, 688 A.2d 1356 (1997) (granting a mistrial after a trial judge made an independent investigation); *Garrard v. Stone*, 624 N.E.2d 68 (Ind. 1993) (granting a new trial after the trial court conducted an independent investigation); *State v. McCrary*, 676 N.W.2d 116 (S.D. 2004) (reversing a case for resentencing based upon a trial court's independent investigation). The appearance of an impartial judge is fundamental to our legal system. As the United States Supreme Court aptly stated, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 17 (1954).

Lest I be misunderstood, I do not suggest that a judge should be required to recuse whenever an order to show cause is issued and a contempt action is pursued.

Quite to the contrary, I am well aware that contempt is a unique proceeding where the judge acts as both trier and finder of fact. *Henry v. Eberhard*, 309 Ark. 336, 832 S.W.2d 467 (1992). Nonetheless, where the judge presiding over a contempt proceeding marshals the evidence to be used at trial by making an independent investigation into the facts, the most fundamental notion of justice and fair play requires the judge to recuse.

For the above stated reasons, I respectfully dissent.

BROWN, J., joins.

IN THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

STATE OF ARKANSAS PLAINTIFF

VS. CASE NO. CR 2000-2498

RICHARD ROSS DEFENDANT

[ENTERED: MAY 14, 2003]

ORDER

On March 5, 2003, March 14, 2003, April 4, 2003, and May 12, 2003, came on for hearing the Order to Show Cause issued on February 12, 2003, ordering Sam Perroni to appear and show cause why he should not be held in contempt of court for willful disobedience and/or willful resistance to the court's order dated August 5, 2002, ordering Sam Perroni to appear for a four day jury trial, beginning Tuesday, January 12, 2003, with Sam Perroni appearing in person and by and through his attorney, Tim Dudley, and from the testimony and evidence presented, the argument of counsel, and all things and matter properly before this court, the court issues the following findings of fact and conclusions of law:

1. On August 5, 2002, in open court in the case of *Ross v. State*, Pulaski Circuit Court Case No. CR00-2498, with the Honorable David Bogard presiding, Sam Perroni, as attorney for the defendant Ross, executed an acknowledgment of a *Scheduling Order*.

2. Such *Scheduling Order* specifically states, "You and your attorney are required to appear before the court in Room 210,401 W. Markham, at the times and on the dates shown for the purposes indicated:". The box for jury trial

was check-marked and the appearance time and date was listed as beginning at 9:00 a.m. on February 11, 2003, for four days.

3. The information in the *Ross* case was filed on July 1, 2000. The February 11, 2003, first-out, four day jury trial setting was the fifth time that die *Ross* case had been set for first out jury trial for four days.

4. On August 9, 2002, Sam Perroni filed a *Motion for Continuance* on behalf of his client, Steven Pirani, in the case of *United States v. Steven A. Pirani; Louis A. Pirani; and Joseph Applegate*, U.S.D.C. No. 4:02CR00130-01 SWW.

5. This *Motion for Continuance* in the *Pirani* case was filed four days after Mr. Perroni executed the *Scheduling Order* in the *Ross* case.

6. On September 4, 2002, the District Court entered an order granting a continuance in *United States v. Pirani, et al*, U.S.D.C. No. 4:02CR00130-01 SWW. Such order specifically states:

> Counsel for the government and defendants have advised the Court of their trial availability. Therefore, this matter is rescheduled for trial to a jury to begin at 9:30 a.m. on Monday, February 10, 2003, in Little Rock, Arkansas.

7. At all times from September 4, 2002, through February 10, 2003, Sam Perroni's client, Steven Pirani, was scheduled to appear for trial in federal court beginning February 10, 2003.

8. Sam Perroni never filed a motion for continuance in 2002 in the *Ross* case.

9. In an *Order* filed January 6,2003, in the *Pirani* case the District Court again recited that the trial of such case was set for February 10, 2003.

10. Mr. Perroni did not file a timely motion for continuance or motion to be relieved as counsel in the *Ross* case after the entry of the January 6,2003 *Pirani* Order.

11. In an *Order* filed on January 17, 2003, in the Pirani case, the District Court again recited that the trial of such case was set for February 10, 2003.

12. Mr. Perroni did not file a timely motion for continuance or motion to be relieved as counsel in the *Ross* case after the entry of the January 17, 2003 *Pirani* Order.

13. Even with the scheduling conflict with the *Ross* case Mr. Perroni never filed a motion for continuance in the *Pirani* case.

14. In an Order filed on February 4, 2003, reciting a telephone conference conducted on January 31, 2003, the District Court provided that there would be two separate trials of the Pirani defendants with the trial of Steven Pirani, the client of Sam Perroni, still scheduled to begin on Monday, February 10, 2003.

15. On January 31, 2003, eleven days before the scheduled trial date of February 11, 2003, Sam Perroni filed a *Motion for Continuance* in this case stating that he had to be in federal court on the *Pirani* case beginning February 10, 2003.

16. The *Motion for Continuance* in the *Ross* case was denied at a hearing held on February 4, 2003. Mr. Perroni did not appear at the hearing on Tuesday, February 4, 2003. Matthew House, an associate of Sam Perroni, appeared at the hearing.

17. On the afternoon of February 4, 2003, Sam Perroni made an oral request that the order denying the continuance be reconsidered. Such oral request was placed for hearing on the docket on February 5, 2003.

18. On February 5, 2003, Sam Perroni appeared for the hearing on the oral motion for reconsideration of the order denying the motion to continue. The oral motion for reconsideration was denied.

19. At the hearing on February 5,2003, the court advised Mr. Perroni that the *Ross* case was the oldest active criminal case out of 338 criminal cases then assigned to the Sixth Division Circuit Court.

20. At the hearing on February 5, 2003, the court advised Mr. Perroni that the *Ross* case was going to be either tried, pleaded, or entered for *nolle prosequi.*

21. At the hearing on February 5, 2003, Mr. Perroni represented to the court that the decision to try his client's case first in the *Pirani* case was announced by the federal district court "just a few days before" Mr. Perroni filed the motion for continuance. Such statements were contrary to Mr. Perroni's representations to the court at the same hearing that the Pirani case had been "scheduled for months" although Mr. Perroni couldn't say which case was scheduled first.

22. At the hearing on February 5, 2003, Mr. Perroni made an oral motion to be relieved as counsel. Such oral motion was expressly taken under advisement pending substitute counsel to try the *Ross* case as scheduled.

23. Mr. Perroni stated at the hearing on February 5, 2003, six days before the scheduled Ross trial date, that it would take a substitute attorney two to three weeks to get the *Ross* case ready for trial.

24. As of February 7, 2003, neither Mr. Perroni nor anyone in his office made contact with the court concerning substitute counsel for Mr. Ross. On such date the court sent correspondence to the parties advising that the motion to be relieved as counsel was denied without prejudice to renewal in the event that appropriate substitute counsel was located.

25. On February 10, 2003, the day before the scheduled four day trial, Mr. Perroni filed a *Renewed Motion for Continuance and Renewed Motion to Withdraw* as counsel of record.

26. On February 11, 2003, the State appeared and announced ready for trial with its witnesses and evidence. The defendant Ross appeared. Neither Sam Perroni nor any member of his law firm appeared to either try the case for Mr. Ross or to argue the renewed motion filed the day before.

27. Because of Mr. Perroni's failure to appear the court was forced to reschedule the *Ross* trial.

28. Mr. Perroni's failure to appear at the *Ross* trial caused the delay and rescheduling of the plea of Charles Ferguson, a co-defendant in the *Ross* case.

29. Mr. Perroni's failure to appear at the *Ross* trial caused the delay and rescheduling for one or more matters set for trial subservient to the *Ross* first-out, four day jury trial setting.

30. An *Order to Show Cause* was issued to Mr. Perroni on February 12, 2003, setting a show cause hearing on March 14, 2003, to determine why Mr. Perroni should not be held in contempt of court for willful disobedience and/or willful resistance to the lawful order and process of the order issued on August 5, 2002, for failing to appear to represent his client at the trial beginning Tuesday, February 11, 2003.

31. A hearing was held on March 5, 2003, to address a number of motions filed by Sam Perroni relating to the *Order to Show Cause*

32. On March 13, 2003, SamPerroni filed a *Notice of Removal* to federal court, such case being styled as *State of Arkansas v. Richard Ross*, U.S.D.C. No. 4:03CR00063 JMM.

33. The evidentiary portion of the contempt hearing was held on March 14, 2003. Pursuant to 28 U.S.C. § 1446(c)(3) this court proceeded with the evidentiary portion of the hearing, but withheld any decision pending the federal district court's decision on the *Notice of Removal*.

34. On May 6, 2003, the federal district court entered its Order in *State of Arkansas v. Richard Ross*, remanding such case back to this court.

35. The final hearing on the show cause order was held on May 12, 2003.

36. The court finds that:

(a) At the time that Mr. Perroni filed the initial motion for continuance in the *Ross* case it had been set for trial for nearly six months.

(b) Mr. Perroni misrepresented his trial availability dates to the federal district court in the *Pirani* case.

(c) Mr. Perroni's misrepresentation to the federal district court created the situation where Mr. Perroni was scheduled to be in federal court for the week beginning February 10, 2003, and in state court beginning February 11, 2003.

(d) At all times subsequent to the entry of the September 4, 2003, *Pirani* Scheduling Order, Sam Perroni had a scheduling conflict between the *Pirani* setting on February 10, 2003, and the *Ross* setting on February 11, 2003.

(e) Mr. Perroni acted with reckless indifference in allowing the scheduling conflict to exist for almost six months and delaying until 11 days before the February 11, 2003 jury trial to file a motion for continuance.

37. The Arkansas Supreme Court has held that an attorney's failure to appear for trial is a form of indirect contempt in which notice and an opportunity to defend is to be afforded to counsel. *See Ivy v. Keith*, 351 Ark. 269, 92 S.W.3d 671 (2002); *Allison v. DuFresne*, 340 Ark. 583, 12 S.W.2d 216 (2000). That is the procedure utilized in the present proceeding. However, the Supreme Court has also held that an attorney's failure to appear pursuant to a Supreme Court show cause order was direct contempt. *See*

Street v. State, 331 Ark. 139, 959 S.W.2d 744 (1998). Several states have characterized an attorney's failure to appear as a form of hybrid-direct contempt. *See State v. Jenkins*, 950 P.2d 1338 (Kan. 1997); *Butler v. Goff*, 950 P.2d 1244 (Idaho 1997); *In re Stanley*, 170 Cal. Rptr. 755 (Cal. Ct. App. 1981). In these cases the contempt arises from the failure to appear by the attorney which occurs in the presence of the court, but is claimed to be excused by matters taking place outside the court.

38. An act is deemed contemptuous if it interferes with the order of the court's business or proceedings or reflects upon the court's integrity. *See Etoch v. State*, 332 Ark. 83, 964 S.W.2d 798 (1998).

39. Based upon the record before the court the court finds Sam Perroni guilty of contempt of court for wilful disobedience of the August 5, 2002 Order issued by Judge David Bogard, by failing to appear to represent his client at the trial scheduled for February 11, 2003.

40. As the penalty for contempt of court, Sam Perroni is ordered to pay the following amounts by noon on Friday, May 16, 2003:

(a) Costs in the amount of $780.00 to reimburse Pulaski County for jurors fees in the amount of $780.00 [39 jurors x $20.00], such amount being payable to the Pulaski County Circuit Clerk;

(b) Costs in the amount of $443.72 to reimburse the Prosecutor's Office for witness fees, subpoena fees, mileage costs, or any other witness fees or expenses expended by the Prosecutor's Office in having the State's witnesses present for trial on February 11, 2003, such amount being payable to the Prosecutor's Office;

(c) Costs in the amount of $55.20 to reimburse Pulaski County for copying and certification of federal court pleadings, such amount being payable to the Pulaski County Circuit Clerk; and

(d) A fine in the amount of $ 1,000.00, such amount being payable to the Pulaski County Circuit Clerk.

IT IS SO ORDERED.

/s/ Timothy Davis Fox
TIMOTHY DAVIS FOX
CIRCUIT JUDGE

5/14/03
DATE

Office of the Clerk
Supreme Court of the State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, Arkansas 72201

Leslie W. Steen
Clerk

September 9, 2004

Timothy O. Dudley
Attorney at Law
114 South Pulaski Street
Little Rock, AR 72201

RE: 03-878. Samuel A. Perroni v. State of Arkansas

Dear Mr. Dudley:

The Arkansas Supreme Court made the following order today in the above styled case:

"Petition for rehearing is denied. Brown, Imber and Thornton, JJ, would grant."

Sincerely,

/s/ Leslie W. Steen, Clerk

LWS:jko

cc: Mike Beebe
Honorable Timothy Fox, Judge
Carolyn Staley, Clerk
(CR00-2498)

Supreme Court of Arkansas
JUSTICE BUILDING
LITTLE ROCK, ARKANSAS 72201

TOM GLAZE
ASSOCIATE JUSTICE

AREA CODE 501
682-6870

September 9, 2004

Ms. Vada Berger
Assistant Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201

Mr. Timothy O. Dudley
114 South Pulaski Street
Little Rock, AR 72201

Dear Ms. Berger and Mr. Dudley:

Because the appellant Perroni offers nothing new that was not already considered in his original briefs, the court denies Mr. Perroni's petition for rehearing. However, the following citation of authority is inserted at the end of the third sentence in the first full paragraph of the slip opinion on page 11 (Ark. June 17, 2004), which reads as follows:

See Gage v. State, 295 Ark. 337, 748 S.W.2d 351 (1988) (the court need not consider arguments where the other evidence against the appellant was overwhelming; even an error of constitutional proportions will not require reversal if it is harmless beyond a reasonable doubt).

Sincerely,
/s/ Tom Glaze
Tom Glaze

/mcp

LAW OR CHANCERY MANDATE

STATE OF ARKANSAS,)
) **SCT. 03-878**
In the Supreme Court)

BE IT REMEMBERED, That at a session of the Supreme Court of the State of Arkansas, begun and held in the City of Little Rock, on September 30, 2004, amongst others were the following proceedings, to-wit:

03 00878

Samuel A. Perroni
Appellant(s)

vs. Appeal from Pulaski Circuit, Sixth Division – CR 00-2498

State of Arkansas
Appellee(s)

Appellant's motion to recall the mandate. Granted 90 days.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case herein stated, I, Leslie W. Steen, Clerk of said Supreme Court, hereunto set my hand and affix the seal of said Supreme Court, at my office in the city of Little Rock, this 30th day of September, 2004.

/s/ Leslie W. Steen
Clerk

By: D C.

Original to Clerk
cc: Timothy Oliver Dudley
Mike Beebe
Honorable Timothy Davis Fox, Judge
Carolyn Staley, Clerk
(CR00-2498)

IN THE CIRCUIT COURT OF PULASKI COUNTY,
ARKANSAS
SIXTH DIVISION

STATE OF ARKANSAS PLAINTIFF

V. NO. CR00-2498

RICHARD ROSS DEFENDANT

SAMUEL A. PERRONI PETITIONER

V.

HONORABLE TIMOTHY DAVIS FOX RESPONDENT

NOTICE OF APPEAL AND DESIGNATION OF RECORD

Samuel A. Perroni, petitioner, hereby appeals the order of contempt entered on May 14, 2003, against Samuel A. Perroni. Appellant designates as the record on appeal the entire Circuit Court record, including any and all exhibits and the orders rendered or entered regarding the contempt hearing, as well as the transcripts of all hearings conducted in the case, including but not limited to the transcripts of hearings conducted on February 5, 2003, January 11, 2003, February 12, 2003, March 5, 2003, March 14, 2003 and May 12, 2003..

This appeal is taken pursuant to Rule l(a) of the Rules of Appellant Procedure. This appeal is taken to the Supreme Court pursuant to Rule 1-2(a)(l) and (5).

A copy of all necessary transcripts has been ordered and financial arrangements have been made as required by the court reporter.

Respectfully submitted,
Timothy O. Dudley, #82055
114 South Pulaski Street
Little Rock, Arkansas 72201

BY: /s/ Timothy O. Dudley

CERTIFICATE OF SERVICE

A copy of the foregoing was hand delivered to the following on this 15th day of May, 2003:

Mr. W.A. McCormick
Deputy Prosecuting Attorney
State of Arkansas
Sixth Judicial District
122 S. Broadway
Little Rock, Arkansas 72201

The Honorable Timothy Davis Fox
401 W. Markham, Suite 210
Little Rock, Arkansas 72201

BY: /s/ Timothy O. Dudley

IN THE SUPREME COURT OF ARKANSAS

SAMUEL A. PERRONI APPELLANT

V. NO. 03-00878

STATE OF ARKANSAS APPELLEE

PETITION FOR REHEARING

AN APPEAL FROM THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

CIRCUIT JUDGE TIMOTHY D. FOX

Timothy O. Dudley
Ark. Bar #82055
114 South Pulaski Street
Little Rock, AR 72201
(501) 372-0080

Attorney for Appellant

PETITION FOR REHEARING

Appellant Samuel A. Perroni, for his petition for rehearing, states:

1. In an opinion rendered June 17, 2004, this Court affirmed appellant's conviction of criminal contempt.

2. The Court made an error of law in refusing to consider all of the points on appeal raised by appellant on the ground that the evidence was sufficient to support the conviction. Specifically, the Court made an error of law in refusing to consider appellant's contentions that Judge Fox erred by serving as both prosecutor and judge, that Judge Fox erred by serving as a witness in a case in which he was a judge, that Judge Fox erred in prejudging the case, that Judge Fox erred by conducting an ex parte investigation of the facts, and that Judge Fox erred by demonstrating an appearance of impropriety.

3. A brief in support of this petition is attached.

Wherefore, appellant prays that his petition for rehearing be granted, that the majority opinion of the Court be set aside, and that the case be reversed and remanded for trial before an impartial fact finder.

Respectfully submitted,

Timothy O. Dudley
114 South Pulaski Street
Little Rock, AR 72201
(501) 372-0080

BY: /s/ Timothy O. Dudley

BRIEF IN SUPPORT OF PETITION OF REHEARING

The majority opinion in this case establishes a new, novel and startling proposition of law - if the evidence is sufficient to support a conviction, it does not matter if substantive errors occurred in the case before the trial court or even if the defendant had an impartial fact finder. The majority opinion denies appellant the right to be heard on substantive issues which mandate reversal, and indeed denies petitioner's constitutional rights to an appeal. While petitioner has no constitutional right to win his appeal, surely he has the right to have the Court address the issues which he raised. The majority opinion fails to do so, and clear legal error was committed by that failure.

The majority opinion lists the issues raised by appellant on page 6 of the opinion. However, the majority opinion fully addresses only the issues of the sufficiency of the evidence and the Supremacy Clause. The opinion completely fails to address several issues raised by appellant, including the issues of whether Judge Fox erred in serving as both prosecutor and judge, erred in serving as both the witness and judge, erred in prejudging appellant's case, erred in conducting an ex parte investigation of the facts, and erred in failing to recuse because he demonstrated animus and retaliation against appellant. The majority opinion holds that it is not necessary to address these issues because "... none of these points adversely affect the facts and Perroni's concessions, which we have already held support Judge Fox's finding of contempt. Consequently, these points become superfluous matters, and we need not address them further." Opinion, p. 11. In essence, the Court held that because the evidence is sufficient to support the conviction, the Court need not address other points of error raised by appellant.

Appellant's counsel has been unable to find any other case in which this Court has held that it need not consider error raised by appellant on the ground that the evidence is sufficient to support the conviction. To the contrary, while the Court is required to consider an argument regarding the sufficiency of the evidence first because of double jeopardy concerns, the Court always considers other issues raised by appellant even if it finds that the evidence is sufficient to support the conviction. For example, in ***Woolbright v. State***, No. CR03-170, opinion issued April 22, 2004, two appellants who were tried together but before different juries both appealed their convictions. The Court addressed the sufficiency of the evidence arguments and held that the evidence was sufficient to convict both appellants. Nevertheless, the Court reversed one of the convictions on the ground that the trial court erred in refusing to suppress evidence.

Similarly, in ***Garner v. State***, _____ Ark. _____, 131 S.W. 3d 734 (2003), the Court first considered appellant's sufficiency of the evidence arguments, and concluded that the evidence was sufficient to support some convictions but insufficient to support others. Nevertheless, the Court went on to consider appellant's contentions that the Court erred in failing to sever the charges against appellant. The Court also considered an evidentiary issue raised by appellant concerning the admission of a flashlight.

If the sufficiency of the evidence to support the conviction renders appellant's other arguments "superfluous," there would have been no need for the Court to consider any of the arguments raised in these cases after concluding that the evidence was sufficient to support the conviction. However, this Court routinely decides cases in which the evidence may have been sufficient to support a conviction, but constitutional violations adversely affecting the defendant's due process rights mandated reversal of the

conviction. Therefore, these arguments should be substantively addressed separate and distinct from any determination as to the sufficiency of the evidence.

The Court's majority opinion in this case, if allowed to stand, will have far reaching consequences and nullify constitutional rights of defendants in criminal cases. For example, it is fundamental that a defendant has a constitutional right to a fair fact- finder, regardless of guilt. See, e.g., ***Simmons v. Lockharf***, 814 F. 2d 504 (8th Cir. 1987). Under the majority opinion in this case, whether or not defendant had a fair and impartial finder of fact would be irrelevant if the evidence is sufficient to support the conviction.

It is also clear that a defendant who is convicted in a criminal case has a constitutional right to appeal that conviction. ***Harkness v. State***, 264 Ark. 561, 572 S.W. 2d 835 (1978). What good is a constitutional right to appeal if the Court will not consider due process issues on appeal if it determines that the evidence is sufficient to support the conviction?

Under Arkansas law, it is well-established that a judge cannot serve as witness in a matter before him. ***Rogers v. State***, 60 Ark. 76, 29 S.W. 894 (1894). It is clear that Judge Fox served as a witness, as well as the judge, in this case. Three justices of this Court concluded, in this case, in dissenting opinions, that Judge Fox in fact violated the Code of Judicial Conduct. Moreover, since the instant case was resolved, a majority of this Court concluded that Judge Fox violated Arkansas law, the Arkansas Freedom of Information Act, when denying appellant access to public records which appellant used in conjunction with his defense in the contempt proceeding. *See Judge Timothy D. Fox v. Samuel A. Perroni and Patrick R. James*, Case No. 03-1230. Under the majority opinion in this case, however,

violation of appellant's right to an impartial fact finder, that is, one who does not serve as witness in a case in which he also serves as judge and fact finder, cannot be vindicated because the Court simply will not address the issue.

It is also clear that, under Arkansas law, a judge is prohibited from conducting an ex parte investigation of the facts in a case in which he presides. The majority opinion does not refute that proposition - it simply fails to address it. That failure is particularly puzzling in light of Justice Glaze's opinion concurring in part and dissenting in part in the case of ***Ivy v. Keith***, 351 Ark. 269, 92 S.W. 3d 671 (2002). In that case, Dan Ivy was held in contempt of court for failing to pay Rule 11 sanctions ordered by the trial court. Justice Glaze concurred with the reversal of the contempt conviction, but dissented from the majority opinion in part because Justice Glaze did not believe it was the duty of the trial court to give notice of contempt upon remand. In discussing that issue, Justice Glaze stated:

> "In a proceeding for indirect contempt, like the one here, it is not proper for the trial judge to initiate his own investigation, or act on the presumption that a party (Ivy) has violated a court order and then notify the party to appear to show cause why he should not be held in civil contempt. To condone such a procedure would be nothing short of adopting an inquisitorial system whereby the judge conducts the trial, determines what questions to ask, and defines the scope and extent of the inquiry. That is not our system."

Although ***Ivy*** involved civil contempt, surely a defendant in a criminal contempt matter is entitled to at least the same protections that a defendant in a civil contempt matter has. Why is it, then, that it was

impermissible in *Ivy* for the judge to initiate his own investigation and conduct the trial, determine the questions to ask, and define the scope and extent of the inquiry, but that same procedure is permissible in this case?

Finally, petitioner poses these questions to the Court. If petitioner had not raised the sufficiency of the evidence as an argument on appeal, but had raised all other points, would the Court have considered all points raised? If the sufficiency of the evidence had not been raised as an issue, would the Court nevertheless have examined the sufficiency of the evidence and, if it found it sufficient, refused to consider the other points raised on appeal? Is appellant being punished because he raised the sufficiency of the evidence as an issue on appeal?

Under our system of justice, a defendant in a criminal case is entitled to a fair trial before an impartial fact finder. That is so regardless of guilt or innocence. The majority opinion in this case does a great disservice to those bedrock principles of American jurisprudence by simply refusing to consider the issues because the majority determined that the evidence was sufficient to establish guilt. The holding of the majority wreaks injustice not only on the petitioner, but on our system of justice and the principles upon which it was founded.

Petitioner respectfully prays the Court to grant his petition for rehearing, to vacate the majority opinion in this case, and to reverse and remand the case for trial before an impartial finder of fact.

Respectfully submitted,

Timothy O. Dudley
114 South Pulaski Street
Little Rock, AR 72201
(501) 372-0080

BY: /s/ Timothy O. Dudley

CERTIFICATE OF MERIT

I hereby certify that I believe that his petition for rehearing has merit and that it is not filed for purpose of delay.

/s/ Timothy O. Dudley
Timothy O. Dudley

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed to the following on this 2 day of July, 2004:

Circuit Judge Timothy Davis Fox
Pulaski County Circuit Judge
210 Courthouse, 401 W. Markham St.
Little Rock, AR 72201

Honorable Mike Beebe
Arkansas Attorney General
200 Catlett-Prien Tower Building
323 Center Street
Little Rock, AR 72201

BY: /s/ Timothy O. Dudley